THE INTERAGENCY TASK FORCE
"BLUEPRINT" FOR REFORMING PRODUCT LIABILITY TORT LAW IN THE UNITED STATES*

Duane J. Gingerich**

I. INTRODUCTION

The Federal Interagency Task Force on Product Liability released its Final Report November 1, 1977. Eighteen months in the making, this report represented the efforts of a large number of people in both government and private organizations. In over 600 pages it describes the causes, nature, and scope of product liability problems that have arisen in the United States. Approximately

* The views expressed in this article are those of the author and do not represent the views of the Interagency Task Force.


The Federal Interagency Task Force was created in April 1976. Agencies participating as Task Force members were: the Department of Commerce, Council of Economic Advisers, Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Transportation, Department of Treasury, Office of Management and Budget, and the Small Business Administration. The Consumer Product Safety Commission provided advice and assistance.

Originally the Task Force was instructed to prepare a report for President Ford's Economic Policy Board (EPB) on or before December 15, 1976. The Task Force commissioned an insurance, an industry, and a legal contractor to gather the basic data. The initial report to the EPB was to indicate the scope and dimension of the problem and to suggest potential solutions. The Task Force filed a preliminary report on December 15, 1976. The EPB then issued a modified version of this report on January 4, 1977, entitled the "Interim Briefing Report."

On the basis of this report, the EPB mandated that the Task Force's contractor studies be edited and published. This was accomplished between January and April 1977, with the Interagency Task Force's publication of a seven-volume PRODUCT LIABILITY: LEGAL STUDY (1977), a one-volume PRODUCT LIABILITY: INSURANCE STUDY (1977), and a two-volume PRODUCT LIABILITY: INDUSTRY STUDY (1977). The INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT (1977) [hereinafter cited as FINAL REPORT] is a synthesis of the three contractor reports as well as other information that came to the Task Force's attention.

The Task Force had the assistance of an Advisory Committee on Product Liability comprised of several dozen individuals representing the gamut of interest groups concerned with the product liability problem. See FINAL REPORT, supra note 1, at vi.

Among the major findings of the FINAL REPORT:

1. Availability and cost of insurance. Product liability insurance is available for most firms, but costs have risen very sharply since 1974. The impact has generally been greater on small, as compared to large, businesses. While the average cost of
one-third of that space is devoted to an analysis of potential remedies for those problems.¹

such insurance is less than one percent of sales in most industries studied by the Task Force, it is greater—as high as ten percent—for some firms in some industries.

2. Impact on new product development. The cost of product liability insurance may reinforce trends against new product development so that some socially beneficial products may never be developed or may be discontinued.

3. Business failures. Product liability problems do not appear to have been a direct and sole cause of a large number of business failures, according to the Final Report.

4. Product liability claims. The report estimates that from between 60,000 to 70,000 product liability claims were filed in 1976. It indicates that there was absolutely no basis for estimates that appeared in some trade industry press stating that one million claims were filed in that year.

5. Product liability loss prevention. Many manufacturers of high-risk products are devoting more time and money to product liability loss prevention because of increased insurance costs and the tort-litigation system.

¹ The most frequent criticism leveled at the Task Force is that its Final Report did not make specific legislative recommendations to Congress or to the Administration. The official explanation given by Undersecretary of Commerce Sidney Harman at a news conference coinciding with the release of the Final Report was that this was not the Task Force’s mandate. According to Harman, consistent with instructions from the EPB, the Final Report was to stop short of recommending specific legislation. Nevertheless, upon his confirmation as Undersecretary in March 1977, Harman apparently requested the Task Force staff to reach “conclusions,” no doubt anticipating a storm of criticism if the Final Report did little in the way of suggesting solutions to the problems it found.

In a somewhat unusual move, the Department of Commerce on April 6, 1978, released an “Options Paper on Product Liability and Accident Compensation Issues” for public comment. See 43 Fed. Reg. 14612 (1978). This “Options Paper” had been sent to the White House on February 24, 1978, with suggestions on how the Administration might respond to the product liability issue. As this Article goes to press, the Carter Administration has yet to indicate what it proposes to do about the product liability problem.

However, the Department of Commerce’s “Options Paper,” may offer some clues. Briefly, it recommends two short-term and nine long-term solutions. The short-term recommendations are:

(1) The Internal Revenue Code should be amended to permit qualified businesses to set aside a portion of their pre-tax income to fund a specific reserve for self-insurance against product liability claims and related costs.

(2) The Department recommends that the Administration not pursue either a federal insurance or a reinsurance program relating to product liability.

As for long-term solutions, the “Options Paper” advances these recommendations:

(1) Prepare a report that would include draft product liability insurance regulation standards. The report should indicate whether and to what extent direct federal regulation of product liability insurance is warranted.

(2) Draft a model product liability law that could be implemented at the federal level or utilized by the states.

(3) Draft legislation for federal standards in the area of Worker Compensation should include a provision that would render Worker Compensation a sole source of monetary recovery for workers injured in product-related accidents.

(4) A study should be conducted to determine whether a practical no-fault product liability system can be developed, in whole or in part, for consumer products.
The Final Report identified three principal causes of the recent dramatic rise in product liability insurance premiums: insurance ratemaking procedures, the tort-litigation system, and unsafe manufacturing practices. The Task Force was unable to say whether one cause was more important than another, but noted the tendency for each group with a special interest in the product liability problem to claim that the "cause" was attributable to the conduct of some other group.

Perhaps the most comprehensive research document currently available on the product liability situation in the United States, the Final Report lends itself to analysis from many directions. For example, it tackles the controversial role that product liability insurers have played in the so-called product liability "crisis." It also analyzes the potential of product liability prevention techniques. Nevertheless, the present inquiry is more limited. Having isolated the tort litigation system as one of the three principal "causes" of the product liability problem, the question is what the Task Force offered in the way of remedies to perceived problems in that system. The Final Report has been touted by its authors as a "source

(5) A program should be developed whereby the federal government more effectively distributes product risk information to manufacturers, distributors, and retailers.
(6) A special loan program that would permit qualified small businesses to obtain product liability loss prevention technical assistance.
(7) Legislation should be drafted that would permit the formation of captive insurance companies in the area of product liability.
(8) Administrative or legislative guidelines should be developed that would assist private insurers in the formation of voluntary insurance pools. Legislation that would require insurers to pool product liability insurer risks should not be developed at this time.
(9) The Administration should establish an Interagency Council on Accident Compensation. The Council would have the initial responsibility for reviewing and coordinating federal initiatives in the area of accident compensation.

5 Final Report supra note 1, at 1-20-31. Among the "other causes" which the Task Force isolated but did not consider to be as significant as these three were inflation, consumer and worker awareness, increases in the number and complexity of products, and product misuse.
6 Id. at 1-21. "It is our view that the product liability problem is based on a confluence of causes and that it will be resolved only if each cause is properly addressed."
7 Id. ch. V, "Product Liability Insurance," at V-1-50. In both its interim briefing report and its final report, the Task Force refused to declare the present product liability situation a "crisis." It recognized, however, that "product liability problems present a potential disruptive effect on the economy. More importantly, the problem is not amenable to simple remedies. It is a subtle problem in which the interests of consumers, workers, manufacturers, distributors, retailers and insurers have to be balanced." Id. at I-2.
9 "We have concluded that this cause of the product liability problem can only be addressed by a careful review of product liability as a whole." Id. at I-28.
document" capable of leading "policymakers and other interested parties toward constructive solutions for problems that have arisen in the area of product liability." What, if any, "blueprint" for tort reform does the Task Force offer?

The answer to this question is not as readily apparent as one might expect. Frequently, so called "conclusions" of the Final Report are less than illuminating. In fact, the lines of the "blueprint" (if one can call it that) are anything but crisp and clear on many details. To reach that conclusion, however, it is necessary to follow the Task Force through its analysis of remedial approaches to tort law reform. That involves, first, proposals to modify some basic product liability rules; secondly, proposals to modify a number of basic product liability rules relating to damages; thirdly, remedial approaches to product liability rules relating to workplace injuries; and finally, two alternatives to the present tort litigation system of compensating consumer product injuries—no-fault and arbitration.

II. BACKGROUND TO STATUTORY TORT REFORM

A. Intrinsic Problems

Few would argue with the statement that the product liability problem is terribly complex. Nor would many argue that solutions are likely to appear out of the blue as if by magic. The problem has been analogized to the fable of the blind men and the elephant. Some, quite plausibly, will perceive the product liability "elephant" as solely a legal problem. Some will see it as an insurance problem. Still others might see the problem strictly as an engineering or a manufacturing problem. In short, product liability is viewed as whatever kind of problem a person's blinders permit him or her to

---


11 This is intended more by way of comment than criticism. For example, although describing its study as the "most thorough" on the topic ever published in the United States, the Task Force acknowledged that "it does not purport to answer all questions" relating to the problem. Again, while reaching "some important conclusions," the Task Force conceded that "firm conclusions" about the product liability problems are difficult to reach. Considering the disparate consumer, insurer and business group interests that it was seeking to balance, this imprecision is perhaps understandable.

12 Chapter VII of the Final Report focuses on both tort and insurance remedies. Part V of Chapter VII discusses "Proposed Modifications of Product Liability Insurance Mechanisms." This Article does not include that topic, but concentrates solely on the tort litigation remedial proposals discussed in the Final Report.
see. The difficulty arises, of course, in the realization that the product liability problem is each and all of these things at the same time. This feature renders the single magical solution, just that—so much magic.

Approaches to product liability solutions suffer from the same limited perception. Some think that legislation is the only answer. Others suggest that the answer should be found in the continued development of the common law. Still others believe that the solution lies in designing safer products. Under these Babel-like circumstances, perhaps the only thing one can say with confidence is that there is no single solution that will satisfy everyone.

The Task Force apparently opted for a legislative approach to tort law reform. This seems implicit in the following statement:

There has been over 10 years of intense litigation in the area of product liability, since the publication of Restatement of Torts Section 402A. There are sufficient resources to allow a legislature to make a rational decision in regard to those issues. It would seem that the product liability insurance problem might be on its way toward resolution if legislatures, in the immediate future, took action on those matters.

At another point, the Task Force seemed to despair of solutions coming from the continued development of the common law. It noted that the "uncertainty" which it found underlying much of the problem in product liability law "springs from the nature of the common law itself." In fairness, however, if the Task Force is to be criticized for selecting the legislative vehicle to tort-litigation reform, it is less for taking that position than for failing to articulate a full appreciation of the complexities of statutory tort reform.

There are problems. The legislative reformer, like a skilled surgeon, must know how deep to cut if the operation is to be successful. Cutting too deeply into the structure of the tort system may upset established relationships between the tort law and other areas of the law. There is always the danger of legal overkill—a danger of removing sound parts of the system with the unsound. On the other

---

14 Final Report, supra note 1, at VII-19.
15 Id. at VII-15.
hand, trying to correct imbalances in the system by wielding the knife too lightly may result in new statutes or rules which the parties may evade simply by changing the way they construct their pleadings or argue their cases.\(^\text{17}\)

As if this is not difficult enough, historical developments throw another monkey wrench into the works. Should product liability tort reforms be adopted at the state or federal level?\(^\text{18}\) The question is not an easy one. Unfortunately, the Task Force sidestepped the issue, leaving it to the "policymakers."\(^\text{19}\) If and when they decide to move forward with tort reform, these same policymakers may discover to their consternation that the venue of such reforms may be as important to the overall product liability solution as the proposed reforms themselves.

B. The Task Force Guidelines

The preceding discussion merely adds to the wisdom of reversing a well-known maxim in the product liability context to say that "for every solution, there is a problem."\(^\text{20}\) Essential to reform, of course, is a point of reference from which to measure what the state of affairs in product liability law ought to be. To its credit, the Task Force set out six guiding principles for evaluating potential modifications in product liability law:

1. Ensure that a person injured by an unreasonably unsafe product receives reasonable compensation for his or her injury.
2. Ensure the availability of affordable product liability insurance with adequate coverage to manufacturers that engage in reasonably safe design and quality control practices.
3. Place the incentive for risk prevention on the party or parties who are best able to accomplish that goal.
4. Expedite the reparation process from the time of injury to the time the claim is paid.
5. Minimize the sum of accident costs, prevention costs and transaction costs.
6. Make the remedy specific and concrete in nature and format.\(^\text{21}\)

\(^{17}\) Id. at 53.
\(^{19}\) Final Report, supra note 1, at xlv.
\(^{20}\) LaFalce, Product Liability: Where Do We Go From Here, in MAAC II Proc., supra note 16, at 9.
\(^{21}\) Final Report, supra note 1, at VII-2-8.
Viewed objectively, these principles seem unassailable. However, the likelihood of achieving all of these objectives in any given remedial package is probably slim. Nevertheless, without such guidelines, however general and unrefined, there is a greater likelihood that the cure will end up worse than the disease. Having raised these concerns about the inherent difficulties in statutory tort reform, it remains to determine how well the Task Force approached the wide variety of remedial tort reform proposals.

**III. Modifying Basic Product Liability Rules**

**A. Introduction**

Most of the remedial proposals aired by the Task Force assume the continued existence of the present tort litigation system in which liability is determined on a case-by-case basis. Proposals have been offered to scrap the system in the product liability context, but so far there have been few takers. Furthermore, the legal contractor for the Task Force concluded that the existing tort system was basically sound and that any modification attempted should be in the nature of “refinements” rather than a “major overhaul.”

Underlying this conclusion was a complementary perception that even drastic changes in the present law would not likely have an immediate impact on the availability or affordability of product liability insurance. This is a theme repeated frequently in the Task Force’s analysis of how certain basic product liability rules might be modified.

**B. Basic Standard of Responsibility**

According to the Task Force, a major culprit in the current product liability problem is the “lack of predictability” in basic product liability rules. The Task Force argued that insurers suffer “tremendous uncertainty” about what their insured’s basic responsi-
sibilities are and, therefore, presumably err on the side of extreme caution when setting their premium rates.  

Whether insurers are in fact as incapacitated by these uncertainties as the Task Force claims is not immediately clear from any data presented. Rather, the Task Force's conclusion seems to be a common sense perception of how intelligent people might react to the admittedly confusing sets of standards that courts in 50 states impose on a manufacturer's conduct.

In any event, the Task Force seemed to trace this lack of predictability in basic product liability rules to the nature of the common law itself, developing as it has on a case-by-case basis. More specifically, however, the Task Force focused on section 402A of the Restatement (Second) of Torts and the uneven perception of its strict liability principle among the states. For example, some states require a defective condition to be "unreasonably dangerous," while others merely require that the product be "defective."

Two areas, particularly, are singled out as having caused courts extreme difficulty in formulating standards for product manufacturers: design defect and failure to warn of unsafe conditions. Courts have compounded confusion in these types of cases by reaching results under strict liability theories that would have been no different under negligence theories.

25 Id. at VII-18.
26 Id. at VII-15.
29 The State of California is the leading jurisdiction which holds that the product need not be "unreasonably dangerous" in order for the plaintiff to recover, merely "defective." Cronin v. J.B.E. Olson Corp. 8 Cal.3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). See also, Barker v. Lull Engineering Co., 6 Product Safety & Liability Rep. (BNA) 95 (1978).
30 As Dean Wade has stated:

In the case of the improper design which makes the product dangerous, whatever is enough to show that it is so dangerous that strict liability should apply . . . , will also be enough to show negligence on the part of the manufacturer. Even if the manufacturer is not aware of the danger created by the bad design, he is negligent in not learning of it. This is also true if the product is unsafe because it did not carry a suitable warning or adequate instruction. The proof necessary to establish strict liability will certainly be sufficient to establish negligence liability as well.

There are thus innate similarities between the actions in negligence and in strict
What does the Task Force propose to do about this perceived crisis of uncertainty over the standard of responsibility? Without stating so clearly, the Task Force appeared to support the suggestion of its legal contractor that one cause of action be developed for product liability cases. The legal contractor’s conclusion was that courts, despite lip service to strict liability, have not abandoned negligence and fault concepts in design defect and duty-to-warn cases, and that to recognize this reality would help to reduce some of the present confusion.31

The Task Force agreed with the concept of a single cause of action for products cases.32 Under such a concept, manufacturers should be held strictly liable in manufacturing defect cases. On the other hand, in design defect or failure to warn cases, the Task Force concludes that foreseeability and seriousness of harm should be balanced against the utility of the product and the burden on the manufacturer to avoid the risk. In the latter situations the Task Force concluded that strict liability under the tort system did not appear to be sound long-range policy.33

C. Statutes of Limitations or Repose

Beyond the uncertainties in the tort law surrounding the standard of responsibility are others equally deserving of attention. Product manufacturers, especially manufacturers of durable goods, have had less than clear guidance from the courts as to their continuing duty with respect to older products.34 Citing its insurance contractor study, the Task Force suggested that there seems to be a correlation between the insurance underwriter’s concern about the potential for losses involving older products and the increase in liability premiums for manufacturers of durable goods. At the same time, the Task Force noted that it had information which suggested that any “reform” in this area as in others, would not automatically result in lower premiums.35

Statutes of limitation or repose and a useful life limitation are the

---

liability, and changing the terminology does not alter this.


31 See IV PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 94-96.

32 FINAL REPORT, supra note 1, at VII-19.

33 Id. at VII-19-20.

34 E.g., Tucker v. Unit Crane & Shovel Corp., 256 Or. 318, 320, 473 P.2d 862 (1970) (“... prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe. ...”).

35 FINAL REPORT, supra note 1 at VII-21.
reforms considered. Some states already have statutes of limitations for product liability actions, beginning at the time of initial sale or manufacture. The Task Force concedes that there is some merit to the argument that a statute of limitations in product cases based on time of injury may be "unfair" to capital equipment manufacturers since they sell relatively few products and may not be able to pass-on their product liability costs in higher prices. Nevertheless, the Task Force was troubled that under a statute of repose, some victims of injury from an old defective product will be prevented from suing to collect damages.

How does the Task Force resolve this tension between a manufacturer's need to cut off stale claims and an individual's right to be compensated for injury caused by defective products? First, it advances, then discards as administratively unworkable, a suggestion to limit a manufacturer's duty to the "ordinary useful life of that product." The Task Force found two major difficulties with this approach: the difficulty of deciding who should set the standard for a given product's "useful life" and the difficulty of actually defining such a period for all or most products.

Secondly, the Task Force offered a number of "suggestions" to guide a statutory change to existing statutes of limitation. At the heart of these suggestions is a recommendation to distinguish workplace and non-workplace (or consumer) product injuries. The Task Force concluded that it "would seem reasonable" to give the manufacturer of workplace goods a ten-year statute of repose. At the same time, however, the employer should remain responsible for an

---


37 FINAL REPORT, supra note 1 at VII-25.

38 Id. at VII-28.

39 Id. The Task Force makes a special point of limiting this recommendation to a manufacturer's responsibility under tort law. The Supreme Court of Oregon has upheld the application of that state's ten-year statute to a product-related injury:

A cause of action may be constitutionally abolished or limited so long as it is not done arbitrarily and there is a legitimate, countervailing public interest or policy which arguably is served by such action. There are legitimate public policies which are served by the enactment of a statute of ultimate repose, which policies have heretofore been identified.

injured worker's out-of-pocket expenses if the employer has subjected a worker to an unsafe machine. If, on the other hand, the accident was the result of a defect present in the machine when it was sold, the employer should have an opportunity in an arbitration proceeding to place the cost of the accident on the manufacturer.\footnote{Final Report, supra note 1, at VII-28.}

For consumer product injuries, the Task Force favored a slightly different approach. The same ten-year from time of sale limitation would apply, with the restriction that for injuries caused by defects in a product when sold, but not manifested until after ten years, the manufacturer would still be subject to liability for the injured person's "actual economic losses." An arbitration proceeding (not a trial) would be the vehicle to handle such cases.\footnote{Id. at VII-29.}

As with any compromise solution, neither the product manufacturer nor the product consumer will find the Task Force's solution totally satisfactory. Considering the fact that in most states the appropriate statute of limitations still runs from the time of injury, the victim of a product-related injury sustained ten years after the sale of a product has the most to lose under the Task Force suggestion. In view of data indicating that only four percent of bodily injury claims still have not occurred eight years after the date of manufacture of the product,\footnote{Insurance Services Office, Product Liability Closed Claim Survey (Highlights) 4 (1977). [hereinafter cited as ISO Survey Highlights].} it may be appropriate to question whether the manufacturer's need to cut off stale claims has not been given undue attention.

D. The Unavoidably Unsafe Product

The Task Force notes that despite rather specific language in the Restatement (Second) of Torts\footnote{Restatement (Second) of Torts, § 402A, Comment k (1965).} which exempts manufacturers of "unavoidably unsafe" products from liability, the legal status of such products remains clouded. Citing the Swine Flu experience, the Task Force commented that an "unavoidably unsafe duty limitation" embodied in legislation "would reduce the uncertainty that has led to the substantial rise in product liability insurance premiums."\footnote{Final Report, supra note 1, at VII-31.} The Task Force was quick to point out, however, that such legislation would not necessarily mean that insurance would suddenly become more available or affordable.
The Task Force was "convinced" that the section 402A exception should remain in the law for the present. For the long-term, however, the Task Force favored a no-fault system for pharmaceuticals and other potentially unavoidably unsafe products.45

E. Developing Predictable Legal Standards

1. State of the Art Defense

Product manufacturers would like to see a statutory defense to liability which would bar recovery when a product conformed to the industry norm at the time the product was sold.46 They complain that in judging whether their products are unreasonably dangerous and thus "defective" at the time of sale courts view their products in light of current technology and knowledge.47 Courts generally admit evidence of industry custom with respect to a product, but follow the time-honored view of Judge Learned Hand that such evidence should not be a final determinant of the issue of proper design, since an entire industry may be remiss in its designs.48

Before stating its own view on a state of the art defense,49 the Task Force outlined the several alternatives available. One would be to create a presumption that a product was not unreasonably unsafe if the defendant could show that the alleged defect in its product conformed with industry custom. Another approach would be to legislate product standards. A third approach would be to require the court to instruct the jury to focus on the technology and knowledge of product risks known at the time the product was manufactured.50

---

a Id. at VII-32.
b NATIONAL ASSOCIATION OF WHOLESALERS-DISTRIBUTORS, PRODUCT LIABILITY PROPOSED AMENDMENTS TO STATE STATUTES 7 (undated) [hereinafter cited as NAW PROPOSED AMENDMENTS].
c The term "state of the art" has proved to be confusing to the courts. Some courts have equated the term with common industry customs. See, e.g., Lunt v. Brady Manufacturing Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970). Others have taken a broader engineering definition and have considered state of the art to be the highest standards economically and technically feasible—not simply industry custom. See, e.g., Badorek v. General Motors Corp., 11 Cal.App.3d 902, 90 Cal. Rptr. 305, 328 (1970).
d The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).
e A difficulty in discussing a state of the art "defense" is that it takes three possible forms: (1) what some designers of similar products were doing at the time of product design, (2) what some designers of similar products theoretically could have done at that time, and (3) what designers of similar products were doing generally at that time in the exercise of "practical skill in performance." Raleigh, The 'State of the Art' in Product Liability: A New Look at an Old Defense, 4 OHIO NORTH. L. REV. 249, 253 (1977).
f FINAL REPORT, supra note 1, at VII-35-36.
It would be "inadvisable," the Task Force concluded, to legislate a state of the art defense based on industry custom. Such a defense would undermine the principle of placing the incentive for risk prevention on the party best able to accomplish that goal. The Task Force offered a suggestion for handling design defect cases, however, by commenting that liability perhaps should result only if the product failed to conform to a "practical and reasonable" state of the art standard viewed from the perspective of the time of manufacture. Factors to consider in such cases would be the technology available, the cost and practicality of alternative design choices, and the industry custom.

As for the presumption of the no-defect approach, the Task Force supported such a remedial step in the case of particular products which had product standards developed by neutral and reliable sources. At the same time, the Task Force recognized that it might cost too much to develop such standards for all products.

2. Compliance with Safety Standards Defense

Having disposed of arguments for an "industry custom" state of the art defense, the Task Force proceeded to test the arguments for and against liability of a manufacturer when the product in question complied with relevant legislative or administrative standards. The Task Force conceded that the latter defense had stronger arguments in its favor than a state of the art defense.

For a variety of reasons, courts in the United States have never given their blessing to an absolute compliance with safety standards defense. First, such standards are suspected of being little more than a rubber-stamped version of existing industry standards. Secondly, such standards cannot possibly be comprehensive enough. Thirdly, such standards become out-dated quickly. The key concern of the Task Force was whether a complete standards compliance defense might not have an unfortunate impact on risk preven-

---

31 Id. The fact that a particular product meets or exceeds requirements of its industry is not conclusive proof that the product is reasonably safe. Gilbert v. Stone City Construction Co., Inc., 357 N.E.2d 738 (Ind. 1977).
32 Final Report, supra note 1, at VII-37. An Arizona court has recently held that a manufacturer is not held to a duty to produce a machine which incorporates only the ultimate in safety features. Rodriguez v. Besser Co., 115 Ariz. 454, 565 P.2d 1315 (1977).
33 Final Report, supra note 1, at VII-37.
34 Id. at VII-42.
36 Final Report, supra note 1 at VII-38.
tion incentives in that it would "permit manufacturers to sit back and rely on out-of-date government standards. . . ."57

The Task Force saw little merit in treating compliance with federal regulations differently from compliance with state standards, even though federal regulations arguably may be stricter.58 Both sets of standards have problems related to quality and timeliness, the Task Force concluded.

Reading between the lines, however, there is language in the Final Report which would hold the door open for a possible discretionary use of a compliance defense. The Task Force cites with at least backhanded approval the new Utah product liability law which applies a rebuttable presumption of nondefectiveness in cases where the alleged defect was in conformity with government standards.59 The Task Force concluded that where a court was satisfied with the quality and timeliness of a particular product standard, "it might be inappropriate" to allow a jury to require more of the defendant.60

F. Regulation of Expert Testimony

The failure of some courts to regulate expert witness testimony is cited by manufacturers as causing uncertainty in determining whether their products will subject them to tort liability.61 After acknowledging that there is indeed a problem of the "biased expert" in the tort litigation system, the Task Force identified two approaches to curb that tendency: (1) courts make wider use of court-appointed experts under a procedure modeled on Federal Rule of Evidence section 706, and (2) courts in major product liability cases hold preliminary hearings to test the qualifications of experts.62

57 Id. at VII-40.
58 Id. at VII-42. Section 2074(a) of the Consumer Product Safety Act expressly rejects a federal compliance defense: "Compliance with consumer product safety rules . . . shall not relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 2074(a) (1976).
59 UTAH CODE ANN. § 78-15-6(3) (1977) (rebuttable presumption of no defect in all cases where the alleged defect conformed with government standards).
60 FINAL REPORT, supra note 1, at VII-40.
61 Apparently there are expert witnesses for hire, who for a fee will alter credentials and testimony to suit a particular case. See Donaher, Piehler, Twerski & Weinstein, Technological Expert in Product Liability Litigation, 52 TEX. L. REV. 1303, 1312 (1974).
62 FINAL REPORT, supra note 1, at VII-46. Professor Weinstein and three colleagues have proposed a three-step analysis for testing such qualifications:

Initially, the court must be satisfied that the pervasive discipline, as identified by a given issue, is within the scope of the witness's background skills. Then the prospective witness must persuade the court that the self-education that he has undertaken involved a legitimate application of his basic skills. Finally, the witness
The Task Force concluded that it did not know whether either or both of these alternatives would improve results, but it doubted that the use of these methods would make the situation worse. Furthermore, the Task Force suggested that an arbitration procedure with an expert sitting as one of the triers of fact could be even more effective.

G. Product Misuse

Product manufacturers have long complained about what they consider the unfairness of shouldering the entire responsibility for a product injury when in fact the product user (or an employee) was responsible to some degree for the injury. American courts have not spoken with a clear voice on this subject. Some appear to limit a manufacturer's responsibility to producing a product that is safe in its ordinary, intended use. Others have held that a manufacturer must anticipate foreseeable misuses and warn against them. Most, however, agree that a manufacturer's duty stops short of warning about unforeseeable misuses.

The Task Force discussed, then dismissed as impractical, a possible solution to product misuse which would have a neutral source predetermine what is or is not a foreseeable misuse of a product for tort law purposes. In the workplace injury context the Task Force criticized the new Utah approach which shields the manufacturer from liability when "a substantive contributing cause of the injury was an alteration or modification of the product." The manufacturer ought to bear some responsibility for warning about a hazard, the Task Force argued, in cases where it was reasonably foreseeable that an employer or employee might alter the product so as to make

---

must demonstrate that he has been sufficiently thorough in acquiring this self-education to achieve a level of qualification consistent with the technical issues that he will address.


Final Report, supra note 1, at VII-46.


E.g., Barnes v. Litton Industrial Products, Inc., 555 F.2d 1184 (4th Cir. 1977).

See Restatement (Second) of Torts, § 402A, Comment h (1965); see also Dale & Hilton, Use of the Product—When Is It Abnormal?, 4 WILLIAMETTE L.J. 350 (1967).

Final Report, supra note 1, at VII-48-54.

The remedial proposal which the Task Force seemed to favor was the adoption of a comparative responsibility system. In the typical foreseeable misuse consumer product case, this system would result in a plaintiff having his or her damages reduced by the corresponding amount of responsibility for the injury. Such a system might also be applied to cases in which third parties have misused the product, for example, employers in the workplace injury situation. The Task Force expressed some concern that this system might raise employer's insurance costs and disrupt the workers' compensation system. It went on to state, however, that an additional advantage of a comparative fault or responsibility system would be to eliminate the troublesome distinctions between contributory negligence and assumption of risk that have been giving courts conceptual headaches.

Having said that, it is not easy to determine exactly where the Task Force comes to rest in its analysis of a comparative responsibility system. Depending upon one's predilections, there is grist for every mill in its discussion. Bending backwards to be fair, the Task Force in this instance left the issues in equipoise, perhaps no closer to resolution than before. This equivocal position is the more surprising since a growing majority of states have already adopted some form of comparative negligence. Some courts have even taken the lead and applied comparative fault principles in the context of strict liability.

---

70 Final Report, supra note 1, at VII-50.
71 There are three basic types of comparative negligence currently in use. Under a "pure" comparative system, the plaintiff's recovery is simply reduced by the degree of contributory fault. See, e.g., Fontaine v. Devonis, 336 A.2d 847 (R.I. 1975).

"Fifty percent" jurisdictions employ a form of comparative negligence which allows the negligent plaintiff to recover a percentage of his or her damages only when the plaintiff's negligence does not equal or exceed that of the defendant. E.g., Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974).

The third type of comparative negligence allows the apportionment of damages when the contributory negligence of the plaintiff is "slight" in comparison with the negligence of the defendant. E.g., Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920).

72 Final Report, supra note 1, at VII-54-55. The Florida Supreme Court recently removed assumption of risk as an absolute defense from under its comparative negligence system. Assumption of risk was merged with the defense of contributory negligence and now operates in Florida merely to reduce plaintiff's damages and not as a complete bar. Blackburn v. Dorta, 350 So. 2d 25 (Fla. 1977).
IV. MODIFYING PRODUCT LIABILITY RULES ON DAMAGES

A. Introduction

The Task Force's claims that "one of the most efficient ways to 'reform' product liability law" would be to modify the rules on damages. That proposition seems to rest on the fact of life in product liability litigation that ultimately everyone comes around to discussing damages. The Task Force did not analyze every conceivable modification of the law of damages, but concentrated instead on five key areas: attorney's fees, awards for pain and suffering, the collateral source rule, punitive damages, and use of periodic payments. Overall, the thrust of the Task Force's analysis is toward modification rather than abrupt departure from existing rules.

B. Attorney's Fees

Probably as controversial as any single item on the reform agenda, proposals to change the present contingent fee system in any drastic way have not met with much success. A few states now regulate contingent fees in product liability cases using a sliding scale approach of reduced fees for increasing amounts of recovery.

Quite correctly, the Task Force begins its analysis by noting that defense attorney fees also figure significantly in the cost of product liability insurance. Indeed, the final Insurance Services Office (ISO) Survey shows that for every dollar of loss actually paid to an injured plaintiff, insurers incur defense costs of an additional 35 cents for bodily injury and 48 cents for property damage cases, regardless of who wins. The ISO study estimates defense attorney's fees to account for 83 percent of defense costs.

Nevertheless, plaintiff's contingent fees have been the subject of most of the unfavorable publicity and the calls for reform. In the

---

73 Final Report, supra note 1, at VII-56.
74 The Florida Supreme Court recently rejected a Florida Bar Association proposal to impose limits on the size of contingent fees, while approving rules on division of fees and fee disclosure. In re Florida Bar, Re Amendment to Code of Professional Responsibility (Contingent Fees), No. 48-384 (Fla., filed July 14, 1977), 20 ATLA L. Rptr. 350 (1977).
76 ISO SURVEY HIGHLIGHTS, supra note 42, at 3.
77 NAW PROPOSED AMENDMENTS supra note 46, at 12-13.
Task Force's view, however, there is no assurance that product liability premiums would go down even if the contingent fees were eliminated, much less modified. The Task Force did find some undesirable aspects to the contingent fee, in that it can create a conflict of interest in settlement situations and create a situation in which the winner indirectly pays the legal costs of those with unsuccessful claims. The contingent fee may tempt some attorneys to bring frivolous suits, the Task Force added, but in its view the better response to this problem was to punish the few individuals who abused the system rather than abolish it entirely.\(^7\)

On balance, the Task Force favored retaining the contingent fee system in some fashion. Implicit in the Task Force's analysis is a concern that drastic change would not be appropriate as long as either federal or state governments did not appear willing to step in for those persons who would not be able to afford legal services if the contingent fee disappeared. The Task Force stated that the sliding scale contingent fee system "makes sense" although it may work unfairly under certain circumstances.\(^8\) It rejected as impractical a related proposal to eliminate damages for pain and suffering and allow a court to award the attorney's fee.\(^9\)

C. Pain and Suffering

In personal injury action awards for pain and suffering often exceed the aggregate award for all out-of-pocket losses.\(^8\) A 1972 study estimated, in fact, that for every dollar awarded for out-of-pocket loss, $1.50 was awarded for pain and suffering.\(^9\) There is considerable debate, however, whether such a drastic step as eliminating damages for pain and suffering would actually reduce the size of jury awards. While the Task Force found only that "value judgments" abound in this area, it did venture the judgment that proposals to eliminate pain and suffering damages are "more likely" to

---

\(^7\) Final Report, supra note 1, at VII-58-63.
\(^8\) Id. at VII-63.
\(^9\) Id. at VII-61-62.
\(^8\) See V Product Liability: Legal Study, note 23 supra, at 96.
\(^9\) J. O'Connell & S. Simon, Payment for Pain and Suffering, appendix V (1972), at 10. Professor O'Connell since has taken the position that this estimate is too low, stating that "very often an arbitrary rule of thumb is adopted which pays a multiple of, say, two or three, or even seven or ten, times the medical bills to compensate for pain and suffering."

have a long-range (presumably as opposed to short-range) effect on insurance premiums.84

Essentially, the Task Force concluded that proposals to limit rather than eliminate pain and suffering awards had the most merit. It considered three approaches to limit such awards:85 limiting the award to a specific multiple of special damages, setting a ceiling on awards, and limiting awards based on the type of injury suffered. The Task Force found the first unsatisfactory, in part because of the potential for malingering. The second it found objectionable as unfair to those most severely injured. The third approach found most favor, although not without some concern about the arbitrariness and potential for prolonging litigation. Here again, however, the Task Force’s somewhat opaque conclusion implies that whatever reform occurs in this area, the impact on premiums would likely be in the long-term stabilization of insurance rates rather than their short-term reduction.86

D. Modifying the Collateral Source Rule

The “collateral source rule” is a widely accepted principle of tort law which permits an injured party to recover benefits from as many sources as he has had the foresight to marshall in advance, in addition to recovering from the tortfeasor. In practice, the collateral source rule operates as an evidentiary rule, excluding defense evidence offered to show that the injured plaintiff had already recovered partial or full compensation for his or her loss.87 Proponents of reform in this area argue that the rule is economically wasteful to the extent that it allows double recovery for damages, as for example, in cases where health or accident insurance already covers the injury. The Task Force pointed out, correctly, that the collateral source rule does not always result in double recovery, since a typical “collateral source” such as a Worker Compensation carrier may be subrogated to a plaintiff’s claim against the defendant.88

The Task Force weighed the numerous pros and cons of retaining the collateral source rule, finding little to recommend its complete abolition, except in strict liability cases. In the latter case, the Task Force concluded that a modification seeking to eliminate double

---

84 Final Report, supra note 1, at VII-69.
85 Id. at VII-68-69.
86 Id. at VII-69.
88 Final Report, supra note 1, at VII-70.
recovery would be "both theoretically and practically consistent" with risk distribution theory.\textsuperscript{89}

The Task Force also appeared willing to accept a modified collateral source rule modeled on medical malpractice statutes in several states which provide for reduced damages where the plaintiff has been reimbursed by public collateral sources.\textsuperscript{90}

On balance, however, the Task Force raised more issues than it answered with respect to this proposed remedy. There is nothing in the text of the Final Report which would contradict the conclusion of the Task Force's legal contractor that "[m]odification of the collateral source rule is a feasible remedy."\textsuperscript{91} The Task Force did suggest that strict product liability law was an area in which "selective abolition" of the rule "might well be justified."\textsuperscript{92}

E. Restricting Punitive Damages

All but a handful of American jurisdictions permit a jury to award "punitive" as well as compensatory damages when the defendant has engaged in intentional or reckless disregard of the rights of the plaintiff.\textsuperscript{93} The Task Force restricted its analysis to problems that punitive damages may create in product liability cases. It found several. First, punitive damages could work an unreasonable hardship on a corporation faced with a multiplicity of lawsuits stemming from a single actionable wrong. Second, where a corporation is the defendant, the ultimate brunt of a punitive award may well fall either on the corporation's stockholders or on the public.\textsuperscript{94}

At one point the Task Force concluded, without amplification, that the use of punitive damages has an "important potential deterrent effect."\textsuperscript{95} This conclusion seems to be undercut, however, by a finding of the legal contractor that there have been relatively few cases with punitive damage awards.\textsuperscript{96} Perhaps the key word here is "potential" deterrent effect.

In any event, the Task Force made at least one suggestion for

\textsuperscript{89} Id. at VII-72.
\textsuperscript{90} E.g., OHIO REV. CODE § 2305.27 (1975); TENN. CODE ANN. § 23-3418 (1975); 40 PA. STAT. ANN. § 1301.602 (1976).
\textsuperscript{91} See V PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 142.
\textsuperscript{92} FINAL REPORT, supra note 1, at VII-75.
\textsuperscript{93} See Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1258 (1976).
\textsuperscript{94} FINAL REPORT, supra note 1, at VII-76-77.
\textsuperscript{95} Id. at VII-249.
\textsuperscript{96} See V PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 119.
changing the tort law in the case in which a single actionable wrong by a corporation results in a multiplicity of lawsuits, with the possibility of multiple punitive damage awards. In such a case the Task Force recommended that a judge, and not the jury, set the amount of punitive damages, taking into account what already had been paid.\textsuperscript{97}

\textbf{F. Periodic Payments}

Under long-established practice, the trier of fact in a product liability case must make a lump sum award of damages at the time of trial.\textsuperscript{98} If the effects of the injury are more than temporary, however, the plaintiff may suffer loss of earnings or medical and other expenses in the future which a one shot lump sum calculation is not likely to reflect very accurately.

In view of serious problems claimed to result from the speculative nature of the lump sum method of product liability verdicts, the Task Force considered a proposal to set up a damage award system where payments would be made in periodic installments. It concluded that to set up such a system within the context of the existing tort litigation system would present "difficult technical and policy determinations."\textsuperscript{99}

The key question for which the Task Force was unable to find a satisfactory answer was "whether the economic efficiency wrought by a periodic payment system would be cancelled out by the administrative costs connected with that approach."\textsuperscript{100} In view of this difficulty, and others, in making a periodic payment system work within the context of the present tort system, the Task Force thought it best that the system be considered in connection with such broad-scale reforms as no-fault and arbitration systems.\textsuperscript{101}

\textbf{V. Modifying Product Liability Rules Relating to Workplace Injuries}

\textbf{A. Introduction}

A significant percentage of product liability litigation involves persons injured in workplace accidents. As reported in the ISO Final Report, supra note 1, at VII-80.

\textsuperscript{97} Final Report, supra note 1, at VII-80.

\textsuperscript{98} See generally, D. Dobbs, Remedies § 8.1 (1973).

\textsuperscript{99} Final Report, supra note 1, at VII-81.

\textsuperscript{100} Id. at VII-82.

\textsuperscript{101} Id. at VII-84.
Survey, while claims by injured employees represented 11% of product liability incidents, these claims accounted for 42% of the total amount of insurance payments for bodily injury.\(^{102}\)

In some instances, workplace injuries have resulted from the actions of someone other than the product manufacturer, for example, an employer. Nevertheless, even where an employer is partly responsible, the manufacturer may be held liable to an injured employee for all damages suffered. This result stems from the concurrence of several statutory and judicial doctrines. Under the current law in most states, the injured worker has two recovery options, both of which can be exercised simultaneously: first, recovery of workers' compensation from the employer or its insurer, and second, recovery from the manufacturer in a (successful) tort suit. However, as part of the worker compensation "bargain," the injured employee may not sue a negligent employer.\(^{103}\)

Moreover, the manufacturer sued by the injured employee is not permitted in most states to recoup those litigation costs from the negligent employer.\(^{104}\) However, even where the employer was negli-

\(^{102}\) ISO Survey (Highlights), infra note 42, at 5. The Interagency Task Force's industry contractor compiled data from a number of federal and state accident and injury reporting systems. With respect to workplace injuries caused by products selected for study by the Task Force, e.g., industrial machinery and chemicals, grinding wheels, metal castings. Final Report, supra note 1, at 1-6. The report indicated that these workplace products accounted for the following percentages of accidents in various states: California 14.3%, Wisconsin 9.9%, Washington 9.5%, Maryland 9.4%, and Texas 3.7%. See Interagency Task Force on Product Liability, I Product Liability: Industry Study (1977), at III-7.

In the legal contractor's survey of 655 reported product liability appellate cases in eight representative states, roughly half of the products cases were classified as involving "work-related" injuries (defined somewhat more broadly than "workplace"). III Product Liability Legal Study, supra, note 23 at 79.

\(^{103}\) See generally, VI Product Liability: Legal Study, note 23 supra, at 2-6.


California courts refuse to apply this rule, however, in a product liability situation where the third party was a manufacturer held strictly liable. Ruiz v. Minnesota Mining & Mfg. Co., 15 Cal. App.3d 462, 93 Cal.Rptr. 270 (1971).

The compensation carrier may be able to join the employee’s suit in a subrogation action against the manufacturer to recover amounts paid out under workers’ compensation.105

The Task Force finding106 that manufacturers of workplace machinery were among the hardest hit by the rise in product liability insurance premiums is, therefore, not surprising. Most of the proposals to solve product liability problems arising from workplace claims were initiated by such manufacturers and have as their aim the shifting of costs from manufacturers to employers. The Task Force discusses four remedial devices: modifying the rules on contribution and indemnity, prohibiting or modifying subrogation rights in workers’ compensation claims, validating hold-harmless clauses, and making workers’ compensation an exclusive remedy for workplace injuries.

B. Modifying Contribution and Indemnity Rules

The common law rule of “no contribution among joint tortfeasors” has been changed in many jurisdictions.107 Even where the law permits contribution among joint tortfeasors, however, the great majority of jurisdictions have held that the negligent employer cannot be sued or joined as a joint tortfeasor. Technically, under the worker compensation no-fault bargain with the employee, the employer is not liable to the employee in tort and, therefore, never a joint tortfeasor.108

Against this legal backdrop, capital goods manufacturers petitioned the Task Force to consider proposals to permit them to sue employers for contribution where the latter’s negligence contributed to a product-related injury. The Task Force called proposals to allow manufacturers a contribution claim against negligent employers “one of the most important remedial proposals to reduce product liability premium costs on the part of manufacturers of industrial

[footnotes]

106 FINAL REPORT, supra note 1, at III-18-44.
107 The rule has been changed judicially in nine states, see Comment, Another Look at Strict Liability: The Effect of Contribution Among Joint Tortfeasors, 79 DICKINSON L. REV. 125 (1974). Statutes have changed it in at least 17 jurisdictions. The 1939 version of the Uniform Contribution Among Tortfeasors Act has been adopted in 10 states; the 1955 version in 7.
108 2A A. LARSON, WORKMEN’S COMPENSATION LAW § 76.21 (1976).
equipment.” Beyond that promising beginning, however, it is difficult to determine which one of several alternatives the Task Force considered most appropriate.

For example, on the issue of whether a manufacturer ought to be allowed full contribution from the negligent employer based on their comparative responsibility for a workplace accident, the Task Force simply marshalled the pros and cons. An increased incentive for risk prevention by the employer is balanced against increased legal and transaction costs in accommodating the manufacturer’s third-party claim against the employer. The Task Force did conclude, however, that a compromise remedy allowing manufacturers limited contribution claims up to the amount of the employers’ worker compensation payment had strong equities in its favor. Reading between the lines, the Task Force apparently remained ambivalent about changing the current rules on contribution in the absence of hard data that the proposed remedy would actually improve the safety consciousness of employers.

C. Prohibiting Subrogation by Workers’ Compensation Carriers

Subrogation is the right of a party who has paid the losses of an injured person to sue or otherwise be reimbursed by a third party who was considered responsible under tort law for the injury. In a typical case in most states, an employer who has paid out workers’ compensation benefits to an injured employee is subrogated to the employee’s rights against the product manufacturer. The specific mechanics of subrogation vary among the states. The principal arguments for abolishing subrogation in workers’ compensation cases are: (1) negligent employers should not be able to recoup their workers’ compensation payments when they are to some degree responsible for the accident and (2) subrogation may encourage litigation. The Task Force found no compelling reason to abolish the right of subrogation entirely. It endorsed with uncharacteristic forthrightness, however, the approach used in a minority of states. That ap-

---

109 Final Report, supra note 7, at VII-95.
110 Id. at VII-92.
111 See, e.g., Minn. Stat. Ann. § 176.061(3) (1972): “If the employee or his dependents elect to receive compensation from the employer, such employer is subrogated to the right of the employee or his dependents to recover damages against the other party . . .”
112 See VI Product Liability: Legal Study, note 23 supra, at 48-49 and accompanying footnotes.
113 Id. at 49.
proach results in a reduction of a subrogation claim by the amount of fault attributable to the employer in causing injury to the employee. The Task Force pointed out that, in order for this remedy to affect insurance costs, it should be accompanied by a modification of the collateral source rule in cases where the worker is joined in the subrogation suit. Otherwise, the employee would stand to recover twice.\footnote{\textit{Final Report}, supra note 1, at VII-99.}

\section*{D. Validating Hold Harmless Clauses}

The Task Force noted an "apparent growing use of hold harmless agreements."\footnote{\textit{Id.} at VII-100.} Such agreements in the product liability context are designed to assign ultimate responsibility for injuries or damage caused by defective products. Courts have not agreed as to whether commercial purchasers could contract to assume the risk of liability. Some reveal strong antipathy toward clauses which purport to hold manufacturers harmless from strict liability.\footnote{Compare Delta Airlines, Inc. v. McConnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974) (applying California and Georgia law) and Keystone Aeronautics Corp. v. R. J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974) (applying Pennsylvania law) \textit{with} Sterner Aero AB v. Page Airmotive, Inc., 449 F.2d 709 (10th Cir. 1974).} The argument has been made, however, that since the doctrine of strict product liability was intended primarily to protect consumers, and if their interests are not affected, there is no reason to prevent commercial purchasers from contracting to allocate the risk of loss among themselves.\footnote{\textit{See VI Product Liability: Legal Study, supra} note 23, at 41. This argument seems to be the thrust of a recent decision, S.S. Empresa De Viaco Aerea Rio Grandense (Varig Airlines) \textit{v. The Boeing Co., [1977] Prod. Liab. Reptr. (CCH) ¶ 8028} (commercial airline's claims against manufacturer for loss of $6 million aircraft barred by an exculpatory clause in purchase contract by which the manufacturer effectively disclaimed both negligence claims and strict liability claims).} The Task Force was not as willing to make this consumer/commercial purchaser distinction, suggesting that the goal of placing the responsibility for accidents on the party best able to prevent it would be thwarted by merely shifting the entire responsibility for an accident from one party to another.\footnote{\textit{Final Report}, supra note 1, at VII-102.}

Concerned that hold harmless clauses could be abused, the Task Force nevertheless concluded that "it might be appropriate" to validate such clauses legislatively in certain instances. The suggested instances would be those situations in which the product purchaser requested the product without safety features, failed to warn em-
ployees of specific dangers in using it, altered the product, or failed to properly maintain it.\textsuperscript{119}

E. Workers' Compensation As An Exclusive Remedy

Manufacturers of capital goods and others hardest hit by rising product liability insurance premiums have advanced as a potential remedy a proposal to abolish the right of an injured worker to bring a tort claim against the product manufacturer. The worker would be left solely to recovery under the workers' compensation system.\textsuperscript{120} Although aware that this remedy would have little value to manufacturers of consumer goods, the Task Force's insurance contractor considered this remedy a "high priority" item.\textsuperscript{121} The legal contractor was less impressed. Its review of the case law found it unlikely that such a sole source approach would survive constitutional attack unless workers got a quid pro quo in return for surrendering their right to sue the manufacturer.\textsuperscript{122}

After concluding that the sole source remedy probably would reduce "overall" insurance transaction costs, despite creating new transaction costs, the Task Force stated the two conditions necessary to implement such a remedy: increased benefits and contribution to the workers' compensation system by the manufacturer.\textsuperscript{123} The latter condition is not easily implemented, as the Task Force's discussion of various approaches demonstrated. In its own conclusion, the Task Force considered the best procedure for manufacturer payments into the worker compensation system to be a post-accident arbitration proceeding.\textsuperscript{124}

Overall, the Task Force concluded that "cost effectiveness" and the "potential impact" of making workers' compensation the exclusive remedy for workplace injuries made the scheme "an attractive one for serious legislative consideration."\textsuperscript{125} That conclusion, incidentally, is at least as straightforward as any "recommendation" made in the entire Final Report.

\textsuperscript{119} Id.
\textsuperscript{120} NAW PROPOSED AMENDMENTS, supra note 46, at 20-21.
\textsuperscript{121} INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, PRODUCT LIABILITY: INSURANCE STUDY 4-80 (1977).
\textsuperscript{122} See VI PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 75-77.
\textsuperscript{123} FINAL REPORT, supra note 1, at VII-108.
\textsuperscript{124} Id. at VII-112.
\textsuperscript{125} Id.
VI. ALTERNATIVE COMPENSATION SCHEMES: NO-FAULT AND ARBITRATION

A. Introduction

In any discussion of product liability tort litigation reforms, one obvious, if drastic, remedy is to scrap the system. The thrust of the Task Force's Final Report is not in that direction, but rather in the direction of making adjustments to the present tort litigation system. Nevertheless, stating that "[u]nless the tort-litigation system can be stabilized, pressures toward developing a no-fault compensation system"\(^{128}\) will increase, the Task Force analyzed the pros and cons of a no-fault alternative for compensating consumer product injuries. The Task Force also examined another major alternative — the use of arbitration procedures to replace the jury system as the primary method of resolving product liability disputes. In both instances the Task Force recognized the need for conducting additional research.

B. No-Fault Compensation Schemes

Few would dispute that under the existing fault or strict liability systems of compensating persons injured by products, inefficiencies exist which harm both plaintiffs and defendants. The investigation needed and technical proof required in products litigation is expensive for all parties. Both sides are exposed to the vagaries involved in establishing both the fact and amount of liability. Long delays inherent in the current tort recovery system work to the detriment of uncompensated and suffering plaintiffs. Furthermore, rules which permit recovery of pain and suffering damages and which prohibit deductions to recognize recovery from collateral sources operate to expand the liability of defendants.\(^{127}\)

Is the solution for consumer product injuries a no-fault compensation system? The Task Force provided no clear or complete answer. It described no-fault approaches for consumer-related product injuries as "perhaps the most frustrating" of any remedies studied.\(^{128}\) The Task Force found strong reasons to recommend such systems. Among those reasons were that a true no-fault product liability

\(^{126}\) Id. at VII-228.

\(^{127}\) See generally, J. O'Connell, ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975). For a criticism of Professor O'Connell's elective no-fault approach, see VI PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 112-18.

\(^{128}\) Final Report, supra note 1, at VII-228.
compensation system would increase the likelihood that particular injured persons receive compensation. Another alleged benefit cited was cost savings through reduction of tort system transaction costs.\footnote{Id. at VII-212, 214.}

The Task Force also found major problems. One was that no-fault systems achieve part of their cost effectiveness by not paying for such traditional damages as pain and suffering. Another major problem was the difficulty of determining product liability insurance coverage.\footnote{Id. at VII-218, 220.} Although conceding that pressure to develop a no-fault system will continue, the Task Force stated categorically that "no-fault does not represent an immediate solution to the product liability problem."\footnote{Id. at VII-228.} It recommended, however, that in view of its less than exhaustive analysis of no-fault schemes, an additional study be made to determine if a practical working model could be made.

C. Arbitration

Arbitration is a method of dispute resolution accomplished by a group of individuals with professional experience in the particular subject matter at issue. It is not a "no-fault" procedure since a panel in a products case would still be governed by standard product liability rules on liability and damages.\footnote{Id. at VII-229.} At the same time, an arbitration procedure represents a substantial departure from the typical tort litigation method of compensating victims of product injury, in several respects. For one, it would replace the jury as the trier of fact. For another, the arbitration system employs a fact-finding process geared to more informal evidentiary rules.

The Task Force analyzed three arbitration formats: voluntary binding, compulsory binding, and compulsory non-binding. After analyzing the first format, the Task Force suggested that voluntary binding arbitration probably worked better in the medical malpractice context than in product liability cases.\footnote{Id. at VII-231.} As for compulsory binding arbitration, the Task Force concurred in the view of its legal contractor that compulsory arbitration without a trial de novo would violate the constitutional guarantees of jury trial and due process.\footnote{See VI PRODUCT LIABILITY: LEGAL STUDY, note 23 supra, at 155, citing Application of...}
Compulsory non-binding arbitration is "the most appropriate" for product liability cases, the Task Force concluded, despite possible constitutional weaknesses.\textsuperscript{135} Reviewing recent cases, the Task Force agreed with its legal contractor that such an arbitration proceeding would probably survive attack under state constitution right-to-jury provisions if certain conditions were met.\textsuperscript{136} These conditions would include: (1) allowing a trial review procedure which would admit evidence of the prior arbitration proceeding and (2) showing that there was a product liability problem and that a compulsory arbitration procedure was a reasonable way to resolve it.

The Task Force analyzed what it viewed as the principal benefits flowing from the use of arbitration in product liability cases, including a more accurate determination of product liability cases, reduction of accident reparation costs, and a streamlining of the reparations process. Although concluding that a "properly constructed" arbitration system had "excellent potential" for realizing these benefits, the Task Force admitted it could not prove conclusively that these results would follow.\textsuperscript{137} Nevertheless, the Task Force's generally favorable endorsement of compulsory non-binding arbitration coupled with the favorable endorsement of both its legal and insurance contractors,\textsuperscript{138} give that arbitration alternative a considerable boost for the future.

\section*{VII. Summary and Critique}

Overall the Task Force analyzed some eighteen tort reform proposals, ranging in scope from those which merely tinker with the existing system to those, such as no-fault, which would scrap the tort system entirely. "Our goal," said the Task Force, "was to provide an analysis of remedies that could be readily used by legislatures or others who are giving immediate consideration of product liability reform."\textsuperscript{139} Opinions will differ on how "readily" usable the Task Force's analysis is for legislative purposes. Certainly the Final Report demonstrates a sophisticated grasp of most of the implications of the remedial proposals discussed. However,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{135} Final Report, supra note 1, at VII-238.
\item \textsuperscript{136} See VI Product Liability: Legal Study, note 23 supra, at 155-56.
\item \textsuperscript{137} Final Report, supra note 1, at VII-23.
\item \textsuperscript{138} See VI Product Liability: Legal Study, note 23 supra, at 147-49; Product Liability: Insurance Study, supra note 121, at 4-86.
\item \textsuperscript{139} Final Report, supra note 1, at VII-2.
\end{itemize}
\end{footnotesize}
in its concern to be "fair to all of the groups who have an interest in the product liability problem," the Task Force had to dilute its message to legislators with such singularly ambiguous terminology as, for example, in the case of modifications to the collateral source rule, urging that "very careful consideration" be given to any contemplated change. On the other hand, the Task Force made one of its most straightforward recommendations with respect to an industry custom state-of-the-art defense, calling it "inadvisable" to adopt such a defense.

If, as Undersecretary Harman emphasized upon the release of the Final Report, the Task Force had no clear mandate to come forward with a legislative program, then criticism about fuzzy language and lack of specific legislative guidance in the Final Report is misplaced. In any event, the Task Force implicitly arrived at the important, if not surprising, conclusion that for every product liability tort reform "solution" there is a problem. This conclusion takes on added significance, considering the pressure for tort litigation reform that, if anything, has increased since the product liability problem leaped to national prominence in 1976.

Aside from quibbling over "fudged" recommendations, there are several points in the Task Force's analysis of the ills in the existing tort system which should not be overlooked. For one, the Task Force concluded in almost every instance of a suggested tort reform that there was no assurance that a change would have any immediate impact on the price or availability of insurance. Even in the context of suggestions to adopt statutes of repose to relieve manufacturers of their age-old product liability concerns, some insurance sources indicated that such a change would not be sufficient justification for changing a company's underwriting posture. The Task Force did not analyze the question of whether or not a different result would obtain if a complete "package" of tort reforms were to be enacted simultaneously. Perhaps no hard answer to that question exists.

Practical reality may well dictate that insurers adopt a wait-and-see attitude to determine the effect of a tort reform package on jury verdicts before considering any rate changes. Nevertheless, the point bears emphasis that merely correcting perceived inequities in the existing tort system will not of itself solve the insurance availa-

---

140 Id. at VII-3.
141 Id. at VII-245.
142 See note 10 supra.
143 FINAL REPORT, supra note 1, at VII-21, VII-49.
bility or affordability problem, at least not in the short-term. Furthermore, there are few assurances about the long-term benefits. If this is the case, those who place their hopes for a product liability solution in tort litigation reform should be forewarned to keep their expectations within bounds or face inevitable disappointment.

The above admonition prompts a further inquiry into a basic assumption of the Task Force in analyzing the existing tort system as it did. "There seems little doubt," the Task Force asserted, "that the current product liability problem was caused in part by the tremendous uncertainty on the part of insurers about the nature of the basic standards of responsibility in product liability cases."

This assertion prompts a question. If insurers find the existing product liability tort law rules as unsettling as claimed, would it be unreasonable to expect that they would respond enthusiastically to remedial efforts that would decrease uncertainty, not to mention their insured's potential liability? Why then a cautious wait-and-see attitude? Perish the thought that after all of the Task Force analysis of uncertainty in the existing tort system, it may be that it is less what insurers do not know about the tort system than what they do not like (high awards) that troubles them in setting insurance rates for product manufacturers.

On another point, product consumers should note the candid admission of the Task Force that it "observed that most of the substantive law proposals... we received called for cutting back on the rights of consumers to recover under the tort-litigation system."

The Task Force continued that "[e]ven if some of the tort modifications were justifiable, the social implications of leaving a victim of a product-related accident without compensation might meet with serious resistance from consumer groups." At the same time, the Task Force felt compelled to question the extension of strict liability to design defect or failure to warn cases unless foreseeability of harm was balanced against product utility and the

---

144 Id. at VII-15.
145 In fairness, the American Insurance Association has published a report entitled PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW (Revised Mar. 1977).
146 University of Toronto Professor of Law, S. M. Waddams, suggests that "the current product liability problem in the U.S. reflects difficulties not with the legal basis of liability (strict liability vs. negligence), but with high damage awards and what those have done to the system." 1 PRODUCT LIABILITY TRENDS 28 (1977).
147 FINAL REPORT, supra note 1, at VII-203.
148 Id.
manufacturer's ability to avoid the risk. This posture is even more significant in the face of the recent continued expansion of the strict liability concept, as in California, for example.

Raising these less obvious points about the Interagency Task Force's *Final Report* should not detract from the overall importance of its analysis of tort litigation remedies. Full agreement on such a controversial topic will probably remain a pipe dream, but that the *Final Report* is "basically fair" to the product liability interests of injured parties, manufacturers, insurers, and others is supportable. As a "blue print" for legislative tort reform, however, it leaves something to be desired in terms of precise and practical recommendations for changing a system that has been in existence many years.

---

149 Id. at VII-20.
150 Shepard v. Porter, 76 Cal. App.3d 16, 142 Cal. Rptr. 612 (1977) (recovery of damages for mental shock and resulting physical harm suffered by family members witnessing infliction of death on one of their own based on *strict* liability).