Comments

STRICT PRODUCTS LIABILITY ON THE MOVE: CIGARETTE MANUFACTURERS MAY SOON FEEL THE HEAT

To date, plaintiffs have failed to recover a single penny in damages from cigarette manufacturers for smoking-related injuries. However, a new wave of lawsuits has revitalized the controversy over cigarette manufacturer liability. Scientific evidence linking cigarette smoking to death and disease is mounting. Moreover, the tort law doctrines of strict liability and comparative fault have evolved dramatically so as to favor the injured plaintiff. This Comment argues that these doctrines should be expanded to impose long overdue liability on the cigarette manufacturers for injuries caused by tobacco products.

INTRODUCTION

In 1984 the tobacco industry grossed over 30.7 billion dollars;[1] during this same period more than 300,000 deaths were associated with these tobacco products.[2] For over three decades, injured smokers have sought recovery from cigarette manufacturers for their injuries, but the industry has yet to pay a penny in damages.[3] Besides offering a slim chance of recovery, lawsuits against tobacco companies traditionally have proved to be a tremendous burden for plain-

1. San Diego Union, Dec. 23, 1985, at A9, col. 1.
2. H.R. REP. NO. 805, 98th Cong., 2d Sess. 13, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718, 3726.
3. *See infra* notes 50-55 and accompanying text.

tiffs, often continuing for years.[4] Nonetheless, within the past year plaintiffs have filed numerous lawsuits against various cigarette manufacturers.[5]

The uphill battle these plaintiffs face is alleviated somewhat through the help of many organizations that oppose the tobacco industry.[6] These organizations, such as Group Against Smoke Pollutants (GASP) and Action on Smoking and Health (ASH), are combining their resources in an effort to hold the tobacco industry responsible for the adverse effects of its products. They have joined with numerous physicians to seek cancer patients as potential plaintiffs in lawsuits aimed at cigarette manufacturers.[7] As a result, the tobacco industry has begun to feel the pressure of increased litigation.

Much to the dismay of the tobacco industry, as litigation has increased so too has the chance of plaintiff recovery. For the most part, two factors raise the potential of increased plaintiff recovery. First, scientific evidence which correlates cigarette smoking with cancer is mounting.[8] Although the tobacco industry steadfastly refuses to acknowledge a causal relationship between cigarettes and cancer,[9] both Congress[10] and the American public increasingly believe that cigarettes cause cancer.[11] Second, the doctrines of strict liability and comparative fault have evolved dramatically so as to favor the injured plaintiff. This evolution evidences a trend toward increasing manufacturer responsibility for product-related injuries.

This Comment first examines the development of the scientific evidence linking cigarette smoking to a number of diseases, as well as

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4. Three of the 10 reported cigarette lawsuits have lasted over 12 years. The plaintiff in Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974), litigated his claim from 1962 to 1974. In Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967), the plaintiff filed his case in 1954 and litigation finally ended in 1967. Likewise, Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *question certified on reh'g*, 154 So. 2d 169 (Fla. 1963), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on reh'g*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970), commenced in 1957 only to end in the plaintiff's final defeat 13 years later in 1970.

5. *See* Brody, *Recovery Against Tobacco Companies*, 21 TRIAL 48, 49 (1985).

6. Rust, *Legal Attack on Tobacco Flares*, Am. Med. News, Sept. 20, 1985, at 1, col. 2.

7. *Id.*

8. *See generally* H.R. REP. No. 805, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718.

9. *See* Rust, *supra* note 6.

10. 123 CONG. REC. H594 (daily ed. Jan. 27, 1977)("We can no longer quietly turn our backs on the mountain of scientific evidence proving that cigarette smoking is dangerous to health.").

11. Because causation is a jury issue, a correlation may exist between public opinion and jury determination of causation.

the judicial reactions to lawsuits brought by injured smokers. The Comment focuses on the judicial trend towards facilitating plaintiff recovery through the application of strict products liability and comparative fault. Recognizing the traditional roadblocks to recovery, the Comment argues that a liberal application of the strict products liability doctrine, when coupled with the doctrine of comparative negligence, provides injured smokers the best path to recovery. Because the foremost policy goal of the strict products liability doctrine is that of loss distribution,[12] no reason exists to refrain from imposing strict liability on producers of obviously harmful products such as cigarettes. Cigarette smoking imposes an immense cost upon the public in terms of health care and lost productivity[13] — costs which could be internalized by the tobacco industry and its consumers if liability is imposed upon cigarette manufacturers. This Comment concludes that the cigarette industry must now take responsibility for the hundreds of thousands of injuries caused by its products.

CANCER AND RELATED SMOKING DISEASES

Cigarette manufacturers consistently maintain that scientific studies fail to show a causal relationship between smoking and disease.[14] However, evidence is mounting against this contention. A growing number of studies conclude that cigarette smoking is a major cause of lung, larynx, oral cavity, and esophagus cancer, contributes to bladder, kidney, and pancreas cancer,[15] and may be linked to genetic damage.[16] Despite the results of these studies, cigarette manufacturers still refuse to acknowledge that their products injure the users.[17]

The Surgeon General's Report of 1964,[18] concerning the adverse

12. *See generally* Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 498 (1979).

13. *See infra* notes 161-64 and accompanying text.

14. Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968), *cert. denied*, 397 U.S. 911 (1970); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

15. *See* H.R. REP. NO. 805, 98th Cong., 2d Sess. 13-14, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718, 3726-27.

16. Researchers from Baylor College of Medicine, working in conjunction with the National Institute of Environmental Health Sciences, Columbia University's College of Physicians and Surgeons, and the University of North Carolina Medical School, claim to have developed a test that demonstrates a link between smoking and genetic damage. *See* San Diego Union, Dec. 27, 1985, at A13, col. 1.

17. *See* Rust, *supra* note 6.

18. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) [hereinafter cited as the 1964 SURGEON GENERAL'S REPORT].

effects of smoking on health, was monumental in its significance. Before 1964 the medical community itself was not absolutely convinced that cigarette smoking was harmful,[19] even though some studies suggested a causal link between smoking and lung cancer as early as the 1920s.[20] After examining over 6000 medical and scientific reports, which included animal experiments, clinical studies, autopsies, and population studies,[21] the Surgeon General's advisory committee concluded that cigarette smoking was indeed causally related to lung cancer.[22] The committee further found that cigarette smoking increased the risk of chronic bronchitis and emphysema[23] and was a significant factor in causing larynx cancer.[24] After the publication of these findings, there has been little doubt within the medical community that "cigarettes cause more preventable death, disease, and disability than any other known agent."[25]

Spurred by the 1964 Surgeon General's Report,[26] Congress took action on smoking and its related health problems. On July 27, 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act,[27] which became effective on January 1, 1966. The Act sought to inform the public of the health hazards associated with cigarette smoking by requiring a warning on each cigarette package.[28] Although Congress did not intend to ban the sale and consumption of cigarettes, believing that the smoker "has the right to smoke or not

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19. For example, it was not unusual for cigarette advertisements to portray that certain cigarettes were "Best for You," or that the "Nose, throat, [and] accessory organs [were] not adversely affected by [cigarette] smoking." *See* Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1442 (1980). And one doctor reported that, when speaking to physicians at the American Society of Thoracic Surgeons and the American College of Chest Physicians before 1960, he could not even see across the room because of the cigarette smoke. *See* Rust, *supra* note 6, at 30, col. 1.

20. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 281 (1977) [hereinafter cited as *Cigarettes and Welfare Reform*].

21. A variety of studies were undertaken during the 1920s, 1930s, 1940s, and 1950s, culminating with the Surgeon General's Report in 1964. These studies are outlined in *Cigarettes and Welfare Reform*, *supra* note 20, at 280-83, and in Comment, *The Deadly Weed: Cigarettes are in Trouble*, 5 HOUS. L. REV. 717, 719-21 (1968).

22. 1964 SURGEON GENERAL'S REPORT, *supra* note 18, at 31.

23. *Id.*

24. *Id.* at 32.

25. *See Cigarettes and Welfare Reform*, *supra* note 20, at 280.

26. The report concluded that "[c]igarette smoking is a health hazard of significant importance in the United States to warrant appropriate remedial action." 1964 SURGEON GENERAL'S REPORT, *supra* note 18, at 33.

27. 15 U.S.C. §§ 1331-1340 (1982) (originally enacted as Pub. L. No. 89-92, 79 Stat. 282, and amended in 1984 by Pub. L. No. 98-474, 98 Stat. 2204 (1984)). The 1965 Act required that cigarette packages be labeled with the following warning: "Caution: Cigarette Smoking May Be Hazardous to your Health." The Act barred until July 1, 1969, any federal, state, or local authority from requiring any other warning. For a legislative history of the Act, see 1965 U.S. CODE CONG. & AD. NEWS 2350.

28. *See* 15 U.S.C. § 1331 (1982).

to smoke,"[29] Congress observed that the smoker "has the right to know that smoking may be hazardous to his health."[30]

In 1969 Congress revised the 1965 warning label[31] to read, "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health,"[32] and prohibited cigarette advertising on radio and television.[33] The revision of the warning from "smoking *may* be hazardous" to "smoking *is* dangerous" was prompted by legislative concern that the 1965 warning was inadequate in light of further findings of the Secretary of Health, Education, and Welfare (HEW) concerning the health risks of cigarette smoking.[34] The HEW studies confirmed the findings of the 1964 Surgeon General's Report — that cigarette smoking is the main cause of lung cancer and greatly increases the risk of death from chronic bronchitis and emphysema.[35] Additionally, the HEW reports found that "cigarette smoking can contribute to the development of cardiovascular disease."[36] In light of these findings, Congress felt that a stronger warning was necessary to preserve the public health and better inform the public of the dangers of smoking.[37]

These measures, however, were insufficient. In the decade following the passage of the 1969 Act, scientific research yielded new information concerning the effects of cigarette smoking on health. By 1983 the Surgeon General had labeled cigarette smoking as "the chief, single avoidable cause of death in our society and the most important public issue of our time."[38] In 1983 the Surgeon General reported that cigarette smoking significantly increases the risk of miscarriage, premature births, and low birth weight in pregnant women,[39] and that cigarette smoke contains carbon monoxide.[40]

The mounting dangers resulting from cigarette smoking prompted Congress to take further action. In 1984 Congress again revised the

29. 1965 U.S. CODE CONG. & AD. NEWS 2350, 2352.
30. *Id.*
31. *See supra* note 27.
32. S. REP. NO. 566, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 2652.
33. *Id.*
34. *Id.* at 2654. Reports were made to Congress in 1967, 1968, and 1969.
35. *Id.*
36. *Id.*
37. *Id.* at 2652.
38. H.R. REP. NO. 805, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718, 3725.
39. *Id.*
40. *Id.* at 3729.

required warning label.[41] The Comprehensive Smoking Education Act[42] requires that the previous health warning[43] be replaced by one of four statements that would be displayed quarterly on the packages and advertising of each cigarette brand sold or distributed in the United States.[44] These labels are far more explicit in their warning than the 1969 warnings and reflect Congressional concern over the mounting health hazards of smoking.

Despite the Surgeon General's many reports to Congress, the cigarette manufacturers have failed to acknowledge that a causal relationship between cigarette smoking and disease exists.[45] Rather, the tobacco industry maintains that only a statistical relationship exists between cigarette smoking and disease, and that a mere statistical relationship does not establish causation.[46] The tobacco industry is not without support. For example, in deliberating over the 1965 Federal Cigarette Labeling and Advertising Act, Congress received testimony from a substantial number of physicians who believe that it had not been demonstrated scientifically that smoking causes cancer.[47] Further, studies funded by the tobacco industry[48] have failed to induce lung cancer in animals through the inhalation of tobacco smoke.[49]

Thus, it remains for juries to decide in individual cases whether enough evidence exists to show both that cigarettes can cause cancer and that cigarette smoking actually did cause the cancer involved in the particular case. Because of the increased public awareness of smoking's harmful effects, it is likely that today's jurors believe that cigarettes are more harmful than the tobacco industry would care to admit.

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41. *See* 15 U.S.C. §§ 1331-1333 (Supp. II 1984). The Revision was labeled the Comprehensive Smoking Education Act with the stated purpose of better informing the public of hazards involved with cigarette smoking.

42. Pub. L. No. 98-474, 98 Stat. 2204 (1984) (codified at 15 U.S.C. §§ 1331-1341).

43. *See supra* text accompanying notes 32-33.

44. *See* 15 U.S.C. § 1333 (Supp. II 1984). The four required warning labels are: (1) SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy; (2) SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; (3) SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; (4) SURGEON GENERAL's WARNING: Cigarette Smoke Contains Carbon Monoxide. The labels are to be rotated on a quarterly basis in alternating sequence.

45. *See* Rust, *supra* note 6, at 29, col. 1.

46. *Id.*

47. S. REP. No. 566, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADM. NEWS 2652-53.

48. The tobacco industry has spent 120 million dollars in grants for research through its Council on Tobacco Research. Rust, *supra* note 6, at 29, col. 7.

49. *See id.*

HISTORY OF TOBACCO LITIGATION

Thus far, the tobacco industry has been largely immune from civil liability for smoking related harm. Although tobacco manufacturers have been held liable for consumer injuries resulting from foreign objects in tobacco products,[50] not a single plaintiff has prevailed when the injuries have resulted from the carcinogenic components of tobacco smoke.[51] The tobacco industry has claimed 146 court victories, while plaintiffs claim none.[52] For this reason, the tobacco industry refuses to settle out of court. Of the ten reported cigarette lawsuits before 1984, four were dropped by the plaintiffs without a settlement.[53] In the remaining six, the defendant manufacturers prevailed on the merits — three by summary judgment[54] and three after trial.[55]

The plaintiffs involved in these ten suits attempted recovery under a number of legal theories, including fraud,[56] negligence,[57] implied warranty[58] and strict liability.[59] In negligence actions, plaintiffs typi-

50. *See, e.g.*, Liggett & Myers Tobacco Co. v. Rankin, 246 Ky. 65, 54 S.W.2d 612 (1932)(worms); Weiner v. D.A. Schulte, Inc., 275 Mass. 379, 176 N.E. 114 (1931) (nails); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (human toe); Corum v. R.J. Reynolds Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933) (fishhook); Liggett & Myers Tobacco Co. v. Wallace, 69 S.W.2d 857 (Tex. Civ. App. 1934).

51. *See Cigarette and Welfare Reform*, *supra* note 20, at 298.

52. *See* San Diego Union, Dec. 23, 1985, at A9, col. 1.

53. *See* Garner, *supra* note 19, at 1426.

54. Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir. 1958).

55. Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

56. *See* Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956). In *Cooper*, the plaintiff claimed that the defendant had represented to the public that the cigarettes were not harmful to the smoker's health. The defendant was granted summary judgment because the plaintiff failed to show that the alleged misrepresentations were made by the defendant.

57. *See, e.g.*, Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied* 375 U.S. 865 (1963); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *cert. denied*, 382 U.S. 987 (1966).

58. *See, e.g.*, Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970); Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968), *cert. denied*, 397 U.S. 911 (1970); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), *cert. denied*, 382 U.S. 987 (1966); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956).

59. *See, e.g.*, Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968), *cert. denied*, 397 U.S. 911 (1970); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964);

cally have alleged two breaches of duty owed to the plaintiff by the cigarette manufacturer. The first breach involves the manufacturer's negligent failure to conduct tests to determine if cigarette smoking causes injury to the smoker.[60] The second breach involves the manufacturer's negligent failure to warn the consumer of any adverse consequences related to the use of its product.[61] In all cases, plaintiffs alleged that cigarette manufacturers knew or should have known that cigarette smoking endangered the smoker's health,[62] for manufacturers are held to have the skill of an expert with superior knowledge of their products and thus are obligated to keep reasonably abreast of scientific information concerning those products.[63]

In denying negligence liability, courts consistently have held that liability cannot be imposed for unforeseeable harms because the harms could not have been avoided by the manufacturer.[64] Although cigarette manufacturers must stay informed of scientific studies concerning cigarette smoking, the risks involved with smoking were deemed unforeseeable and unavoidable in light of the existing state of technology.[65] Thus, cigarette manufacturers were not held liable for failing to warn smokers of risks that were completely unknown and uncontemplated.[66]

In six of the ten reported cases, plaintiffs attempted recovery under theories of strict products liability and breach of implied warranty.[67] These plaintiffs contended that the defendants' cigarettes were not reasonably fit for the purpose for which they were sold.[68] To prevail under an implied warranty or strict products liability theory, a plaintiff must prove either that the cigarette manufacturer told the consumer that the product would not cause injury to the consumer, or that the product was adulterated, and that adulteration

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Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

60. *See* Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 300 (3d Cir. 1961), *cert. denied*, 382 U.S. 987 (1966).

61. *Id.* at 299-300.

62. *See id.*; *Ross*, 328 F.2d at 13 n.10; *Lartigue*, 317 F.2d at 40; Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22, 23 (D. Mass. 1957).

63. *See Ross*, 328 F.2d at 13-14 n.13.

64. *See, e.g., Lartigue*, 317 F.2d at 39-40; *Ross*, 328 F.2d at 8-9; *Hudson*, 427 F.2d at 542.

65. *See Ross*, 328 F.2d at 13; *Lartigue*, 317 F.2d at 39-40 ("Tobacco companies are not liable in negligence on the basis of medical studies yet to be published.").

66. *See, e.g., Lartigue*, 317 F.2d at 39-40; *Ross*, 328 F.2d at 9; *Hudson*, 427 F.2d at 542.

67. *See* cases cited *supra* note 58. Generally, the courts treat breach of implied warranty actions in the same manner as strict products liability actions — that is, when liability is imposed under the theory of implied warranty, it is strict liability that is actually being imposed. *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 368 (1965). For the purpose of this Comment, the two theories are combined.

68. *See, e.g., Ross*, 328 F.2d at 6.

caused the consumer's injuries.[69] An adulterated, and thus defective product, is one which does not meet the standards established by the industry for the product.[70] In effect, these plaintiffs had to prove that the tobacco itself was not "commercially satisfactory."[71]

A cigarette manufacturer may be held strictly liable for the foreseeable harm resulting from a product's defective condition if the consumer uses the product for the purposes for which it was manufactured and marketed.[72] Consequently, courts have imposed strict liability upon cigarette manufacturers when plaintiffs were injured by foreign substances in the cigarette or from substandard tobacco used by the manufacturer.[73] The plaintiffs in all six cases did not allege that the cigarettes contained foreign substances or were made from commercially unsatisfactory tobacco.[74] Rather, the plaintiffs simply alleged that smoking cigarettes causes cancer and that smoking the defendants' cigarettes caused each of them to develop cancer.[75]

The attempts to hold cigarette manufacturers strictly liable for smoking-related injuries have met with unanimous disapproval. First, courts have refused to impose strict liability or negligence liability for unforeseeable risks which "no developed skill or foresight can avoid."[76] Second, courts have refused to impose liability if a plaintiff claimed only that his or her cancer was caused by smoking the defendant's cigarettes, rather than claiming that the defendant's tobacco deviated from the commercial norm so as to be unreasonably dangerous.[77] Cigarettes containing only those substances inherent in tobacco itself were not held unreasonably dangerous merely because of the harmful effects of smoking.[78] The overall judicial attitude is best reflected by Judge Goodrich's concurring opinion in *Pritchard v. Liggett & Myers Tobacco Co.*[79]

> If a man buys whiskey and drinks too much of it and gets some liver

69. *See Green*, 391 F.2d at 111; *Pritchard*, 295 F.2d at 302.
70. *See Ross*, 328 F.2d at 9; *Green*, 391 F.2d at 111.
71. *See Pritchard*, 295 F.2d at 302.
72. *See Lartigue*, 317 F.2d at 39.
73. *See supra* note 50 and accompanying text.
74. *See* cases cited *supra* notes 58-59.
75. *See, e.g., Ross*, 328 F.2d at 9.
76. *See Lartigue*, 317 F.2d at 39; *Ross*, 328 F.2d at 11; *see also supra* notes 52-54 and accompanying text. *But see* Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963) (foreseeability of harm held irrelevant in strict liability actions, although liability denied on other grounds).
77. *See* cases cited *supra* notes 58-59.
78. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1974).
79. 295 F.2d 292 (3d Cir. 1961).

> trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and peanuts are pure there is no liability if the cholesterol count rises dangerously. In this case there was no claim that the Chesterfields are not made of commercially satisfactory tobacco.[80]

This rationale effectively precludes recovery for those who started smoking before the 1964 Surgeon General's Report, which publicized the harmful nature of cigarette smoking. Yet even those who began smoking after 1964 have been denied recovery.[81] With the passage of the 1965 Federal Cigarette Labeling and Advertising Act,[82] which required that warnings be placed on cigarette packages, the later plaintiffs hardly can claim they were unaware of the risks of cigarette smoking. By being aware of these risks, plaintiffs are vulnerable to the defenses of assumption of the risk and contributory negligence, which often serve to bar plaintiff recovery completely.[83]

Numerous complaints recently have been filed nationwide against cigarette manufacturers.[84] Most of these suits are predicated upon the failure of cigarette manufacturers to adequately warn consumers of the dangers inherent in smoking tobacco[85] and of the addictive qualities of tobacco.[86] The success of these theories, however, is highly uncertain at this time. In a recent lawsuit alleging failure to warn of addictive qualities, the jury found in favor of the defendant manufacturer.[87] The jury forewoman explained that the jurors were not convinced that the plaintiff was addicted to cigarettes.[88]

In three other lawsuits predicated upon the failure to adequately warn of adverse health consequences, federal district court judges have reached contradictory conclusions. In all three lawsuits, the defendant manufacturer argued that common-law tort actions were preempted by the Federal Cigarette Advertising and Labeling Act,[89] which prohibits states from requiring a warning on cigarettes which differs from that required by the Act.[90] In *Roysdon v. R.J. Reynolds*

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80. *Id.* at 302 (Goodrich, J., concurring).
81. *See* San Diego Union, Dec. 23, 1985, at A9, col. 1.
82. *See* 15 U.S.C. §§ 1331-1340 (1982) (originally enacted as Pub. L. No. 89-92, 79 Stat. 282).
83. *See* San Diego Union, Dec. 23, 1985, A9, col. 1.
84. *See* Brody, *supra* note 5, at 49. As of November 1985 over 15 suits were pending against the various cigarette manufacturers.
85. *Id.*
86. *See* San Diego Union, Dec. 24, 1985, at A1, col. 5.
87. *Id.*
88. *Id.*
89. *See* 15 U.S.C. §§ 1331-1340 (1982).
90. *See* Roysdon v. R.J. Reynolds Tobacco Co., No. 3-84-606, slip op. (N.D. Tenn. Dec. 18, 1985); Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984).

Tobacco Co.,[91] a federal district court upheld the use of the warning as a shield and thus dismissed the complaint. But in both *Palmer v. Liggett Group, Inc.*,[92] and *Cipollone v. Liggett Group, Inc.*,[93] the district courts held that the required warnings did not preempt the states' common-law tort actions. These courts reasoned that the Act prohibits states from requiring *different* warnings, but does not prohibit cigarette manufacturers from placing *additional* warnings upon their packages. The *Cipollone* decision subsequently was reversed, however, by the Third Circuit Court of Appeals which agreed with the conclusion of *Roysdon*.[94] Should the *Palmer* decision be reversed on appeal, a fairly strong precedent will exist in favor of the Act's preemption of state law tort claims based upon the failure of cigarette manufacturers to adequately warn consumers of the risks involved with smoking. If the *Palmer* decision is upheld, however, the uncertainties and inconsistencies concerning the preemption issue will continue.

Regardless of which theory of recovery plaintiffs have alleged, in effect plaintiffs have urged the imposition of strict liability upon cigarette manufacturers for smoking-related injuries.[95] In the past, courts have not been willing to extend the doctrine of strict products liability this far.[96] But the district court decisions in *Palmer* and *Cipollone* appear to signal a new judicial attitude toward such an imposition. After all, if cigarettes are so dangerous as to be implicated in over 300,000 deaths every year,[97] it seems illogical to completely exempt cigarette manufacturers from liability for these deaths. As

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91. No. 3-84-606, slip op. (N.D. Tenn. Dec. 18, 1985).
92. 633 F. Supp. 1171 (D. Mass. 1986).
93. 593 F. Supp. 1164, 1165 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986).
94. The Court of Appeals for the Third Circuit held
> that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986).
95. This analysis was made by Professor Gillam in 1958, arguing for the widespread imposition of strict products liability upon producers. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 153-55 (1958).
96. *See* cases cited *supra* note 58.
97. H.R. REP. NO. 805, 98th Cong., 2d Sess. 13, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718, 3726.

Justice Traynor noted over twenty years ago:

> [I]t is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?[98]

Although courts have yet to impose strict liability upon cigarette manufacturers for injuries related to smoking, manufacturers certainly should be concerned. The judicial trend, which does not appear to be changing, is to increase manufacturer responsibility for harms related to products.[99]

Modern Developments in Tort Law

The trend in tort law has been to enhance the ability of an injured plaintiff to obtain compensation from manufacturers of products which have caused injuries.[100] In the past three decades, courts have expanded manufacturer liability for product-related injuries through the doctrine of strict products liability.[101] Furthermore, many courts have reduced a manufacturer's ability to avoid liability simply because of the plaintiff's own negligence.[102] The cigarette manufacturers soon may find that the defenses used successfully in the past, such as the defendant's lack of knowledge and the plaintiff's assumption of the risk,[103] no longer are dispositive. In effect, courts have moved toward making the manufacturer an insurer of its products[104] — a move which courts in past cigarette litigation have failed to initiate.[105]

Expansion of Strict Liability

Should the courts continue the expansion of strict products liability, the doctrine soon would encompass manufacturer liability for products whose norm is danger — products such as cigarettes. Beginning with *MacPherson v. Buick Motor Corp.*,[106] the courts have expanded a manufacturer's liability for injuries related to the use of its products.[107] Indeed, one commentator described the *MacPherson* decision as marking "the transition from industrial revolution to a

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98. *See* Traynor, *supra* note 67, at 368.
99. *See generally id.*; Levy & Ursin, *supra* note 12.
100. *See generally* Traynor, *supra* note 67; Levy & Ursin, *supra* note 12.
101. *See* Levy & Ursin, *supra* note 12, at 501-04.
102. *Id.* at 502; *see also infra* notes 144-59 and accompanying text.
103. *See supra* notes 54-55 and accompanying text.
104. *See* Levy & Ursin, *supra* note 12, at 500.
105. *See supra* notes 76-77 and accompanying text.
106. 217 N.Y. 382 (1916). In *MacPherson*, the New York Court of Appeals abolished the privity requirement which had precluded most consumers from recovering against manufacturers of defective products.
107. *See* Traynor, *supra* note 67, at 363.

settled industrialized society."[108] Prior to *MacPherson*, the courts reasoned that economic growth would be hampered by holding manufacturers liable for any and all injuries attributable to their products.[109] After *MacPherson*, however, courts increasingly have replaced the traditional rationale with reforms premised upon goals of loss distribution, accident reduction, and fairness.[110] Following this trend toward imposing liability as a more effective method of loss distribution, cigarette manufacturers soon may be held responsible for injuries related to their products.

The goal of spreading accident losses through insurance was advocated first by Justice Traynor in his concurring opinion in *Escola v. Coca Cola Bottling Co.*[111] "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[112] Nineteen years after *Escola*, the California Supreme Court established a theory of strict products liability in *Greenman v. Yuba Power Products, Inc.*[113] The concept of loss distribution, emphasized by the *Greenman* court and subsequent courts[114] "insure[s] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[115]

The theory expounded in *Greenman* imposes liability upon the manufacturer if the product is defective and causes personal injury to the consumer.[116] The *Greenman* rationale subsequently was adopted with some modifications by the Second Restatement of Torts,[117] which imposes strict liability upon anyone "who sells any product in a defective condition unreasonably dangerous to the user."[118] A clear majority of states have adopted section 402A, read-

108. *Id.*
109. *Id.* at 364.
110. Levy & Ursin, *supra* note 12, at 499.
111. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).
112. *Id.* at 462, 150 P.2d at 441.
113. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
114. Levy & Ursin, *supra* note 12, at 501.
115. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
116. *Id.*
117. *See* Snyman, *The Evolution of the Doctrine of Strict Products Liability in the United States*, 11 ANGLO-AM. L. REV. 241, 267 (1982).
118. RESTATEMENT (SECOND) OF TORTS § 402A (1974). A defective product is unreasonably dangerous as marketed if (1) the flaw was present in the product at the time it left the manufacturer's control; (2) the manufacturer fails to adequately warn the

ily accepting the strict liability concept.[119] The trend sparked by *Greenman* toward expanding manufacturer liability thus has taken hold throughout the country.

Unfortunately, the Second Restatement's definition of a defective product has slowed the expansion of strict liability in the area of inherently dangerous products — products such as cigarettes.[120] Because the Restatement test imposes liability only for the *unexpected* dangers of the product, liability is avoided when the risk is foreseeable to the plaintiff.[121] Moreover, with the abundant publicity of the cancer-producing potential of cigarette smoking, the Restatement view effectively denies liability for injuries arising out of tobacco smoking — "good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . ."[122] The policy of allocating losses among the public seemingly has been halted in the many states adopting the Restatement view.

Nonetheless, the California Supreme Court has continued the trend toward increasing manufacturer responsibility. In *Cronin v. J.B.E. Olson Corp.*,[123] the court rejected the Restatement's "unreasonably dangerous" standard because it burdened the plaintiff with proving elements very similar to those required for proof of negligence.[124] The court reasoned that this added burden would undermine the very purpose of strict liability as expressed in *Greenman*.[125] Further, the court noted that the "unreasonably dangerous" standard would exclude liability when the product's dangers were obvious or when warnings were attached to products.[126] Thus, the court

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user of a risk or hazard inherent in the product; or (3) the design of the product was defective in such a way that the product carries a high risk of harm in normal use. *See* W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 695-98 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

119. The following states have adopted section 402A by statute: Alabama, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wisconsin. *See* Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695 (1984).

120. In light of the fact that cigarettes have been linked to over 300,000 deaths every year, it can hardly be argued that cigarettes are not inherently dangerous. *See generally* H.R. REP. NO. 805, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718.

121. *See* Traynor, *supra* note 67, at 370.

122. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1974).

123. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

124. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

125. *See* Levy & Ursin, *supra* note 12, at 503. The purpose of strict liability, as expressed in *Greenman*, was to impose liability upon manufacturers to ensure that losses would be distributed among the public. *See supra* notes 112-15 and accompanying text.

126. *Cronin*, 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442; *see also* Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 537 (1983).

held that plaintiffs need only prove that a defect in the product's manufacture or design proximately caused their injury.[127] The *Cronin* court, however, did not offer an alternative to the section 402A definition of defect.[128]

In *Barker v. Lull Engineering Co.*,[129] the California Supreme Court espoused two alternative methods by which a product may be proved defective. In doing so, the court reaffirmed its intention of facilitating plaintiff recovery by removing negligence principles from strict liability actions.[130] The first test requires that the plaintiff show "that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[131] This, in essence, is the Restatement test. The second test allows a finding of a defect "even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design."[132] Defectiveness thus is measured by present knowledge of the product's safety—not the knowledge at the time of manufacture.[133] Foreseeability of the risk, therefore, becomes irrelevant.[134]

The *Barker* decision continued the California Supreme Court's steady expansion of strict products liability, remaining true to the policy goals advocated by Justice Traynor in *Escola*.[135] By allowing two alternate methods to prove a product defective, the court increased the incidence of plaintiff recovery in products cases as compared to that attainable under section 402A.[136] *Barker* further facilitates plaintiff recovery by shifting the burden of proof to the defendant. Once the plaintiff demonstrates that the product's design proximately caused the injury, the burden then shifts to the defendant to prove that the benefits of the challenged design outweigh the risks of danger inherent in such design.[137] Finally, the *Barker* court

127. *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
128. *See* Diamond, *supra* note 126, at 537.
129. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
130. *See* Levy & Ursin, *supra* note 12, at 503.
131. *Barker*, 20 Cal. 3d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.
132. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. This second method of establishing a product defect has been labeled the *Barker* "risk-utility test."
133. *See id.*
134. *See generally* PROSSER & KEETON, *supra* note 118, at 695-702.
135. *See supra* notes 111-12 and accompanying text.
136. *See* Levy & Ursin, *supra* note 12, at 503.
137. In determining whether the benefits outweigh the risks, the court considered

noted the expanding nature of strict products liability doctrine, and suggested a further expansion: extending liability to manufacturers of products whose "norm is danger."[138]

Should the courts extend liability for products whose "norm is danger," cigarette manufacturers surely would be unable to escape liability for smoking-related injuries. The California Supreme Court's policy goals of risk allocation and loss distribution[139] are consistent with such an expansion of strict products liability. In the past, the doctrines of assumption of the risk and contributory negligence have inhibited courts from extending liability for smoking-related injuries.[140] In conforming to the policy goals behind strict liability, however, courts have less reason to be inhibited in the future.[141]

It is necessary at this point to distinguish obviously dangerous products such as knives or matches from products such as cigarettes. Generally, those who manufacture knives or matches are not held strictly liable for injuries resulting from the use of their product if the product is manufactured without flaws.[142] This Comment does not suggest that manufacturers of knives or matches should be held liable when unfortunate and perhaps careless users are injured by the products. Rather, cigarettes should be treated as being very different from knives or matches. As Justice Traynor observed:

> The now patent risks of cigarettes are not comparable to those of, say, matches or knives. Commentators describe the ignitable tip or the cutting edge as qualities generic to the goods; both the manufacturer and the consumer expect and want the product to burn or cut. The cancer-producing qualities of cigarettes are generic only in the sense that all cigarettes have those qualities but they are neither produced nor consumed for that reason.[143]

Used properly, a knife isn't dangerous; used properly, a cigarette *is* dangerous.

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five factors: (1) the gravity of the danger posed by the challenged design; (2) the likelihood that such danger would occur; (3) the mechanical feasibility of a safer design; (4) the financial cost of an improved design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design. *See Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

138. *Id.* at 430 n.10, 573 P.2d at 455 n.10, 143 Cal. Rptr. at 237 n.10; *see also* Levy & Ursin, *supra* note 12, at 504 n.42 ("*Barker* not only expands the incidence of strict products liability but may itself be an intermediate step toward further expansion—including strict liability for products that would not be considered defective in any ordinary sense.").

139. *See generally* Levy & Ursin, *supra* note 12.

140. *See generally supra* notes 53-55 and accompanying text.

141. Consistently, the courts have been reducing the ability of manufacturers to rely upon such defenses in products liability actions. *See* Levy & Ursin, *supra* note 12, at 504-11.

142. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 649 (4th ed. 1971).

143. Traynor, *supra* note 67, at 370.

Reduction of Available Defenses

Perhaps the greatest obstacle in the path of a plaintiff's recovery has been the defense of assumption of the risk.[144] But manufacturers of harmful products are finding increasingly that the defense, highly successful in the past, is no longer available in products liability actions. This defense is lost because many jurisdictions have taken two important steps towards facilitating plaintiff recovery. The first step was abolishing the defenses of contributory negligence and assumption of the risk, while adopting a system of comparative fault.[145] The second step was applying comparative fault principles to strict products liability actions.[146] The goal behind these steps has been to distribute a greater portion of the risk of injury to the public.[147]

The doctrine of comparative fault arose out of widespread dissatisfaction with the absolute defense of contributory negligence.[148] Rather than operating as a complete bar to recovery, comparative fault shifts the focus from total liability to relative liability, with the recoverable damages being reduced in proportion to plaintiff's fault.[149] Presently, forty-one states have adopted some form of comparative fault.[150]

In abolishing the absolute defense of contributory negligence, many states also have abolished the defense of assumption of the

144. *See generally supra* notes 53-55 and accompanying text. This Comment discusses the evolution of tort law towards the abolition of the complete defenses of assumption of the risk and contributory negligence. It is argued here that this evolution will greatly enhance plaintiff recovery against cigarette manufacturers. For a discussion of how plaintiffs may attempt recovery for cigarette-related harms in states that have not yet abolished the complete defenses, see Note, *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809 (1986).

145. *See infra* notes 151-54 and accompanying text.

146. *See infra* notes 155-59 and accompanying text.

147. Vargo, *Something Old and Something New: Defenses to Strict Liability*, 15 TRIAL 48, 54 (1979).

148. *See* PROSSER & KEETON, *supra* note 118, at 469.

149. *Id.* at 470-72.

150. The nine remaining contributory negligence states are Alabama, Arizona, Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, and Virginia. *See* Leff & Pinto, *Comparative Negligence in Strict Products Liability: The Courts Render the Final Judgment*, 89 DICK. L. REV. 915 nn.21 & 22 (1985). Basically, there are two general forms of the comparative fault doctrine. There is a "pure" form, adopted in 12 states, which allows a plaintiff to recover a percentage of his damages even in cases in which the plaintiff's negligence exceeds that of the defendant. The second is the "modified" form, adopted in 29 states, which allows the plaintiff to recover only if the plaintiff is less at fault than the defendant. The jurisdictions adopting a "modified" form are split in the event that the plaintiff's negligence equals that of the defendant. *See* PROSSER & KEETON, *supra* note 118, at 471-75.

risk.[151] In *Li v. Yellow Cab. Co.*,[152] the California Supreme Court merged "the defense of assumption of risk . . . into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence."[153] By merging the defenses of contributory negligence and assumption of the risk into the doctrine of comparative fault, the courts have removed two very effective defenses asserted by manufacturers of harmful products. Because the defense of assumption of the risk previously had served to deny recovery in cigarette-injury cases, replacing the defense with a system of comparative fault will greatly benefit plaintiffs injured by cigarette smoking.[154]

Another benefit to plaintiffs has been the application of comparative fault principles to strict products liability actions. In *Daly v. General Motors Corp.*,[155] rather than applying the defense of assumption of risk which would have barred any recovery, the California Supreme Court held that principles of comparative fault should apply to strict products liability cases. Since *Daly*, the vast majority of states have applied comparative fault principles to strict liability actions.[156] Nonetheless, a number of courts maintain that the doctrine of comparative fault is inapplicable to strict products liability actions, reasoning that to compare a user's fault with the producer's no-fault liability is to "mix apples and oranges."[157]

Courts applying comparative negligence principles have rejected this reasoning, stating that the underlying purpose of comparative fault — the fair allocation of loss among all parties legally responsible in proportion to the fault of each — applies equally well to strict products liability actions.[158] Comparative negligence is fair to the plaintiff since recovery no longer will be barred completely; it is fair

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151. The states merging assumption of the risk into the doctrine of comparative fault are Arkansas, California, Connecticut, Massachusetts, Minnesota, New York, North Dakota, Oregon, Utah, Washington, Wisconsin, and Wyoming. *See* J. PALMER & S. FLANAGAN, COMPARATIVE NEGLIGENCE MANUAL § 1.22 (rev. ed. 1985).

152. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

153. *Id.* at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 872.

154. *See supra* notes 51-55 and accompanying text.

155. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

156. *See* J. PALMER & S. FLANAGAN, *supra* note 151, § 3A.220.

157. PROSSER & KEETON, *supra* note 118, at 478. *See generally* Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977) ("Comparative fault cannot logically and consistently be applied to the strict liability cause of action . . . . How can comparative fault exist in a cause of action which proceeds irrespective of fault?"). Six courts have held that comparative principles are inapplicable to strict products liability actions: Colorado, Nebraska, Oklahoma, Rhode Island, South Dakota, and Washington. *See* Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695 (1984).

158. *See generally* J. PALMER & S. FLANAGAN, *supra* note 151, § 3A.220.

to the defendant manufacturer because the defendant will be liable only for that harm caused by the product.[159] By applying comparative fault principles, including the abandonment of the assumption of the risk defense, plaintiffs in cigarette actions stand a better chance of obtaining, at minimum, a partial recovery.

JUDICIAL HESITANCE

The final obstacle in the path of smoker recovery is the lingering judicial hesitance to hold cigarette manufacturers strictly liable for smoking-related injuries. A number of possible explanations exists as to why the courts are so hesitant. First, because these smokers freely chose to engage in an activity known to be harmful, they should not be entitled to compensation if injured as a result of that activity. Second, it would be unjust to impose liability upon a producer engaged in a lawful enterprise when the injured users of the product were fully aware of the dangers. Also, because of the vast number of individuals injured by cigarettes each year,[160] such an imposition of liability possibly could destroy the tobacco industry. Finally, because Congress has expressed the intent to maintain the tobacco industry,[161] any judicial imposition of liability that severely could harm the industry would be contrary to the express intent of Congress.

Nevertheless, with the constant expansion of strict products liability, courts soon may be swayed by arguments in favor of imposing strict liability upon cigarette manufacturers. One such argument contends that the harms caused by cigarette smoking are felt not only by injured smokers but by the public as a whole.[162] It is the public that eventually pays for the smokers' health care, either through private insurance programs or government social programs;[163] cigarette manufacturers pay for little or none of the immense costs which their products impose upon society. The cost of cigarette smoking, in terms of health care and lost productivity due to cigarette-related illness, is astronomical, estimated to be as much

159. *Id.*

160. Potential plaintiffs have been estimated to number as many as 700,000 per year. This figure is comprised of more than 300,000 annual deaths and 400,000 injuries. *See* Rust, *supra* note 6; H.R. REP. NO. 805, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3718, 3725.

161. *E.g.*, 123 CONG. REC. H594 (daily ed. Jan. 27, 1977) ("No one suggests that the tobacco industry should be eliminated overnight or that the Government should prohibit smoking altogether.").

162. *See* Bucholtz, *Legal Aspects of the Control of Tobacco*, 4 LEGAL MED. Q. 14 (1980); *Cigarettes and Welfare Reform*, *supra* note 20.

163. *See* Bucholtz, *supra* note 162, at 18.

as twelve billion dollars per year.[164] By imposing liability upon the cigarette producers for smoking-related injuries, the costs associated with these injuries can be shifted from the general public to the industry, ultimately to be shifted to the smokers themselves.[165]

Further, those favoring imposing strict liability upon cigarette manufacturers for smoking-related injuries are not dissuaded by the possible destruction of the tobacco industry. Anticigarette groups promoting suits against the tobacco industry only expect to achieve a moderate cigarette price increase in order to internalize the cost of cigarette injuries and make it more difficult for the young to start smoking.[166] One Wall Street analyst projects that 65,000 people per year, receiving $100,000 each in damages, would add only twenty-two cents to the price of a pack of cigarettes.[167] Most commentators, however, agree that an increase in excess of $2.50 per pack is a more realistic projection.[168] Although such an increase indeed may cause substantial harm to the tobacco industry, if the industry cannot pay for the injuries it causes, perhaps it should be curtailed.

CONCLUSION

Cigarette manufacturers traditionally have escaped tort liability for smoking-related injuries. There are signs, however, that they may no longer escape this liability. Both the constant expansion of strict products liability and the diminishing availability of absolute defenses have created a climate for an increased potential of recovery for the cigarette-injured plaintiff. Further, the increasing amount of evidence connecting cigarette smoking with cancer and other diseases has led to a growing public awareness of these adverse effects. Thus, juries may be more inclined to hold cigarette manufacturers liable for injuries caused from smoking cigarettes. Cigarette manufacturers would be wise to heed the writing on the wall; the courts are not likely to allow the tobacco industry to continue to profit from cigarette sales in the face of the hundreds of thousands of smokers killed each year by cigarette smoking.

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164. *See generally Cigarettes and Welfare Reform*, *supra* note 20. The article outlines numerous studies concerning the public cost of cigarette smoking, ranging from 4.23 billion to 12 billion dollars per year.

165. *Id.* at 324.

166. *See* Rust, *supra* note 6, at 29, col. 1; *see also* Note, *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 824 (1986) ("Recent studies . . . have suggested that cigarette consumption is at least somewhat sensitive to price changes, especially among young smokers.").

167. Rust, *supra* note 6, at 29, col. 1.

168. *Id.*