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## LIABILITY FOR PRODUCT DESIGN IN OHIO — A FIRST STEP TOWARD SOLUTION

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### I. INTRODUCTION

THIS ARTICLE concerns an area of the law of strict liability in tort which is now emerging from an embryonic stage in Ohio — namely, a manufacturer's liability for conscious design choices in developing its product. It is the thesis of this article that in the recent case of *Temple v. Wean United, Inc.*,<sup>1</sup> the Ohio Supreme Court has taken a major step toward a solution to the inherent difficulties in passing judgment upon the reasonableness of a manufacturer's conscious design choices. In doing so, the court has simultaneously lessened the otherwise open-ended exposure of manufacturers to liability concerning claims of defective product design.

The starting point for any general analysis of strict liability in tort begins with section 402A of the *Second Restatement of Torts* which provides in part that "[o]ne who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . ."<sup>2</sup> Under this provision, three types of cases have emerged for which there can be strict liability in tort: where there is (1) a manufacturing flaw; (2) an unreasonably dangerous design; and (3) a failure to warn or instruct properly.

The majority of the early strict liability in tort cases involved products with a manufacturing flaw. In this type of case there is an objective standard against which the product can be compared and shown to be flawed.<sup>3</sup> The

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<sup>1</sup> 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 402A (2) (1965) (emphasis added). In *Temple v. Wean United, Inc.*, 50 Ohio St. 2d at 326, 364 N.E.2d at 276, the supreme court adopted section 402A as the law of Ohio and further stated that it would look to the illustrative comments of section 402A for future analysis in this area of strict liability in tort.

<sup>3</sup> See *Bowman v. General Motors Corp.*, 427 F. Supp. 234, 241 (E.D. Pa. 1977), which states: "We begin with the distinction between a manufacturing flaw and a design defect. The former concept relates to a product which was not manufactured in the manner that it was designed or intended to be."

objective standard is the manufacturer's intended design for the product. If the product does not conform to the manufacturer's intended design, it is deemed to be in a defective condition.<sup>4</sup>

The second category, and the one to which this article is directed, concerns claims of unreasonably dangerous product design. In this situation, a product has been manufactured in accordance with its intended design, and has operated in accordance with its intended design, but the user or person in the zone of foreseeable use is nevertheless injured by the product in an intended use,<sup>5</sup> and in some jurisdictions, a reasonably foreseeable misuse.<sup>6</sup> The injured user contends that the manufacturer's design of the product was "unreasonably dangerous" and the product was thus in a defective condition.<sup>7</sup>

The third category involves products which are considered reasonably safe in design but which are nevertheless deemed to be in a defective condition because the manufacturer failed to issue proper instructions or warnings about the dangers posed by the product in its intended use or a reasonably foreseeable misuse. The design of the product is considered reasonably safe and thus not defectively designed. However, because the product design poses certain dangers to its user in its intended use, the manufacturer has a duty to give adequate warning or instruction with respect to such

<sup>4</sup> Proof of a manufacturing flaw is not sufficient in itself to impose liability on a manufacturer. As set forth in *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 230, 218 N.E.2d 185, 188 (1966), the plaintiff must allege and prove:

- (a) that there was a defect in the product as manufactured and sold;
- (b) that such defect existed at the time the product was sold by the manufacturer;
- (c) that the defect was the direct and proximate cause of the plaintiff's injuries; and
- (d) that the plaintiff, at the time he was injured, was in a place where his presence was reasonably to be anticipated by the manufacturer.

These elements must also be alleged and proved in each of the other two categories of strict liability in tort cases.

<sup>5</sup> See *Gossett v. Chrysler Corp.*, 359 F.2d 84 (6th Cir. 1966); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *Shumard v. General Motors Corp.*, 270 F. Supp. 311 (S.D. Ohio 1967).

<sup>6</sup> See *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Anton v. Ford Motor Co.*, 400 F. Supp. 1270 (S.D. Ohio 1975).

<sup>7</sup> The basic difference between negligence and strict liability in tort, with respect to product design, is that in strict liability the issue is the *condition* of a product, whereas in negligence it is whether the manufacturer *used reasonable care* in designing the product. In *Roach v. Kononen*, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974) this difference was noted:

[T]he basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did.

Notwithstanding this distinction, there is a merger of these two doctrines in design cases because the factors which must be considered and assessed under both doctrines are the same.

dangers. If the manufacturer fails to provide adequate warnings or instructions about these dangers, then the product is considered to be in a defective condition.<sup>8</sup>

## II. UNREASONABLY DANGEROUS DESIGN

When is a manufacturer's design choice for a product deemed "defective"? As noted, in a manufacturing flaw case, there is an objective standard against which to compare the product to determine whether it is flawed and thus defective. That standard is the manufacturer's intended design. In a design case, however, there is usually no element of nonconformity to an objective design standard against which to compare the design under consideration.<sup>9</sup> The product was manufactured, and it performed in accordance with the manufacturer's intended design. Nevertheless, because the user was injured while using the product in an intended use, the user contends that the product's design posed a danger to him and thus the product was in a defective condition.

A product design which poses a danger to its user in an intended use is not necessarily in a defective condition. "Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption."<sup>10</sup> This is true for alcoholic beverages, tobacco and numerous other products of everyday use which pose some amount of danger to their users.

There is no absolute or objective standard of safety which will be true for all product designs. It is for this reason that a product design is

<sup>8</sup> See RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965) which provides:

Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition.

See also the referenced Comment j which provides that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning as to its use."

<sup>9</sup> There are some cases, however, involving design which fall under the manufacturing flaw category of cases. As stated in *Bowman v. General Motors Corp.*,

"At one end of the spectrum are risks of harm which originate in the inadvertent failure of the design engineer to appreciate adequately the implications of the various elements of his design, or to employ commonly understood and universally accepted engineering techniques to achieve the ends intended with regard to the product. . . ."

We treat manufacturing flaws and inadvertent design errors in the same way. We do not because they are both unintended, but because they are both subject to measurement against a built-in *objective* standard or norm of proper manufacture of design.

427 F. Supp. at 241 (quoting Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1548 (1973)).

<sup>10</sup> RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

not considered defective unless it is *unreasonably dangerous* to its user.<sup>11</sup> This standard recognizes that even though a product's design poses *some* dangers to its user in an intended use, the benefits of having a product available to society generally outweigh the product's dangers. It is only when the dangers outweigh the product's benefits that it is deemed unreasonably dangerous.<sup>12</sup>

In the absence of an absolute, objective standard of design appropriateness, how does one assess whether the dangers posed by the product's design outweigh the product's benefits to society — which in turn would determine whether such product was unreasonably dangerous? There is no simple answer. The process of product design assessment is essentially subjective and involves a sophisticated balancing of numerous factors. The evaluation process is a subjective balancing of the product's dangers and its utility. As one court observed:

Where, however, a conscious design choice has caused the injury, we are faced with quite a different problem; for there is no built in objective standard by which the jury can measure the alleged defect. This result stems, at least in part, from the fact that a conscious design choice necessarily involves a trade-off among safety, utility, and cost. The trade-off may be obvious and may also be acceptable to the consumer. At the very least, it reflects the manufacturer's judgment of what would be acceptable if the terms of the trade-off were publicly known. However, the process of evaluating the trade-off, which represents the manufacturer's distillation of the forces of the marketplace, is a sophisticated one which complicates the process of products liability adjudication.<sup>13</sup>

How can the manufacturer know whether the public will agree that the decision to accept the risks of harm associated with the design are justified by virtue of the increased benefits or reduced costs? This question is unanswerable until the product design is involved in litigation, and by then it

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<sup>11</sup> The RESTATEMENT, *id.*, provides that a product is "unreasonably dangerous" when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

<sup>12</sup> See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) which states:

Under the Restatement, liability may not be imposed merely because a product involves some risk of harm or is not entirely safe for all uses. Products liability does not mean that a seller is an insurer for all harm resulting from the use of his product. Rather, a product is "defective" under the Restatement only if it is "unreasonably dangerous" to the ultimate user or consumer. The requirement that the defect render the product "unreasonably dangerous" reflects a realization that many products have both utility and danger. The determination that a product is unreasonably dangerous, or not reasonably safe, means that, on balance, the utility of the product does not outweigh the magnitude of the danger.

is often too late for both the manufacturer and the injured user. Notwithstanding these inherent difficulties in assessing the reasonableness of a product's design, courts and juries have been attempting to perform this function.

#### A. Factors to be Considered in Design Assessment Process

In a trial to determine the reasonableness of a product design, initially the court, and ultimately the jury, must assess the product's dangers against its utility. It is essentially a process of cost-benefit analysis.

The initial category of factors to be considered concerns the nature of the danger posed by the product design: (a) the likelihood of injury resulting from the product design in an intended use, (b) the degree or extent of injury, (c) whether the danger posed by the particular design is open and obvious to its user,<sup>14</sup> (d) the likelihood of avoiding injury by the user's exercise of reasonable care, and (e) the degree to which the danger posed by the design can be avoided or acceptably lessened by adequate instructions and/or warnings by the manufacturer.

Once the dangers posed by the manufacturer's intended design have been defined, the trier of fact must then assess the feasibility of eliminating or alleviating the dangerous characteristics of the intended design. This feasibility inquiry breaks down into a balancing of the technical feasibility of an alternate design against the economic implications.

With respect to technical feasibility, the question is whether there was an alternate design which was less dangerous than the one under consideration.<sup>15</sup> If there was a less dangerous design, one should look to whether any of the product's utility would have been lost<sup>16</sup> and if so, whether the

<sup>14</sup> The manufacturer has a duty to warn properly and/or to instruct product users concerning latent or hidden dangers. See note 8 *supra*.

<sup>15</sup> The time to assess technical feasibility is the point in time when the product was manufactured. *LaMonica v. Outboard Marine Corp.*, 48 Ohio App. 2d 43, 355 N.E.2d 533 (1976). Subsequent changes in the state of the art may be admissible for the limited purpose of showing that an alternate design was feasible at the time the product was manufactured or sold.

In an action based upon strict liability in tort, evidence of subsequent changes and changes in the "state of the art" are not admissible to show that the item is defective. However, such evidence is admissible for the limited purpose of showing that an alternative design was feasible at the time that the item was manufactured or sold.

*Id.* at 44-45, 355 N.E.2d at 535. See also *Bolido v. Improved Machinery, Inc.*, 29 Cal. App. 3d 633, 641, 105 Cal. Rptr. 890, 897 (1973) which concludes that:

Strict liability for deficient design of a product (as differentiated from defective manufacture or defective composition) is premised on a finding that the product was unreasonably dangerous for its intended use, and in turn, the unreasonableness of the danger must necessarily be derived from the state of the art at the time of design.

<sup>16</sup> This dilemma was recognized in *Phillips v. Kimwood Mach. Co.*, 269 Ore. 485, 525 P.2d 1033 (1974).

loss of utility would have been less than the greater safety which would have been achieved with the alternate design.<sup>17</sup>

Economic realities also play a role in the technical feasibility of design choices. If the cost of the alternate safer design would have been too great, then a product's general utility would have been lost. For example, it is technically feasible to build a safer automobile by making it tank-like, and this would reduce or eliminate the likelihood of injury upon collision with another vehicle. However, it is not economically feasible to make such a design change because the increased cost would be prohibitive.

This is the range of relevant factors to be considered by the manufacturer when evaluating the intended design for a product, and these are the same factors which should be considered by a court and jury in determining whether the product design is reasonably safe or unreasonably dangerous.<sup>18</sup> In order to determine rationally whether a design is unreasonably dangerous, it would seem necessary for someone to consider each of

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necessary to alleviate the danger in question may so impair such utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale. Again, the cost of the change necessary to alleviate the danger in design may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility. Such an article is not dangerously defective despite its having inflicted injury.

*Id.* at 495, 525 P.2d at 1036.

<sup>17</sup> See *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971), where the court recognized the assessment difficulties posed by this trade-off between utility and safety and stated that:

To prove defective design, it is insufficient merely to assert that a different design would have alleviated or averted the plaintiff's injuries, since it may be assumed that any particular accident involving man and machine might have been avoided through a variation in the design of the machine. However, such a variation might greatly magnify the chances of other sorts of mishaps taking place, or else render the machine incapable of reasonably efficient performance of its function.

*Id.* at 16, 484 P.2d at 61.

<sup>18</sup> No one court has outlined all of the factors which must be considered in making this "unreasonably dangerous" design determination in the manner set forth in this article. Instead, this listing and analysis is a distillation of those factors and methods of analysis employed by the few courts which have addressed this complicated problem. For example, in *Roach v. Kononen*, 269 Ore. 457, 525 P.2d 125 (1974), the court outlined the various factors it deemed significant:

- (1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
- (2) The safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their

these factors, allocate some relative weight or importance to each, and then decide what a reasonable man would do in light of this balancing of the product's dangers against its utility. To date, however, case authority provides very little guidance on court or jury management of these problems.

In this context, it should be noted that although the analysis for strict liability in design cases focuses upon the *condition* of the product, rather than upon the manufacturer's *conduct* in designing the product, one is led to a consideration and assessment of the same factors outlined above. For this reason, even though a defective design case may be pleaded in terms of strict liability, whether or not the design is in fact defective is essentially a question of negligence.<sup>19</sup>

### B. Jury Evaluation of Product Design

As outlined above, the factors which must be considered in evaluating whether a product design is reasonably safe are numerous and often sophisticated. Nevertheless, this is the task which the law in every jurisdiction currently assigns to the jury. This is a difficult, if not impossible, function for a jury to properly perform.

The principal area of concern about jury performance in design cases is that there is no objective design standard upon which the jury can rely and against which it can compare. Instead, the jury is required to consider each of the aforementioned factors, as addressed by the various witnesses, and establish for itself the standard against which the design will be evaluated. Having gone through this exercise, the jury will in all likelihood have simultaneously decided whether the design is unreasonably dangerous.

In addition, the normal jury is not technically qualified to perform

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avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Id.* at 460, 525 P.2d at 128-29 (quoting Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973)).

<sup>19</sup> This was recognized in *Halvorson v. American Hoist and Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303 (1976).

The common element in both negligence and strict liability theories of product liability is some kind of dangerous defect rendering the product unreasonably dangerous for its intended use. . . . In this vein, one commentator has observed: "It has been argued that a rule of strict liability which permits recovery for injuries arising out of defects in products only when those defects give rise to unreasonable dangers is borrowed from negligence theory. That is an apt observation, since both traditional negligence analysis and the 'unreasonable danger' analysis make liability depend upon whether the utility of the product or conduct in question outweighs, in light of all of the circumstances, the risk of injury and the burden of taking precautions to prevent it."



this standard-setting task. Most jurors in a design case will probably have no technical background to appreciate or understand many of the areas concerning technical feasibility. It is questionable whether a jury can be educated during the course of a trial on the basic elements of the technology involved to evaluate properly whether the design under consideration is unreasonably dangerous.

Moreover, a jury trial is not an objective, dispassionate environment within which to consider rationally these various design factors. Design defect cases often involve plaintiffs who have been severely injured and whose presence during the trial may create sympathy for their position. If there were an objective standard against which to assess the manufacturer's design choice, the sympathy factor would be of less importance. However, where the jury itself is establishing the design standard, sympathy may well play the major role in determining at what point the jury draws the line between a reasonably safe and an unreasonably dangerous design.

Also, at the conclusion of the trial, after the jury has heard testimony about the merits of the various factors, it must reach its decision without the ability to review and/or reassess any of the testimony. The jury is required to rely upon its composite recollection of the evidence in areas which are usually both sophisticated and complicated.

Of great concern is the role and importance of expert testimony in design cases. In the areas of technical and economic feasibility, a design case is basically a battle of the experts.<sup>20</sup> It is unclear if an expert, testifying on feasibility of alternate designs, need do so from a practical or theoretical standpoint.<sup>21</sup>

As a practical matter, courts will normally permit almost anyone to testify as an expert who claims to be qualified by knowledge, skill, experience, training or education.<sup>22</sup> It takes very little foundation testimony to qualify a person as an expert. The judicial process assumes that if an expert is not truly qualified, or if he is only giving theoretical opinions, or if he is otherwise not a proper expert witness, such will become apparent during the examination process and the jury will not be misled. However, an expert's value to a case is often not what he says, but how he says it. Personality, appearance, force of delivery, and many other non-substantive matters are often determinative of how persuasive an expert is in a particular case. If

<sup>20</sup> See, e.g., *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856 (8th Cir. 1975); *Stempel v. Chrysler Corp.*, 495 F.2d 1247 (5th Cir. 1974); *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973).

<sup>21</sup> Proof of theoretical feasibility, in general, is not enough to support an allegation of defective design. See *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971).

<sup>22</sup> See FED. R. EVID. 702.

the substance of an expert's testimony is too sophisticated for the jury, these non-substantive factors may then be determinative.

A final area of concern is the lack of uniformity and consistency which inevitably results when a product design is evaluated in different courts and before different juries throughout the country. A product design characteristic which may appear unreasonably dangerous to one jury may well appear reasonably safe to another. The result is that a product and its manufacturer are exposed to a multiplicity of conflicting evaluations and potential liability.<sup>23</sup>

### III. THE OHIO SOLUTION

Until *Temple v. Wean United, Inc.*, Ohio authorities appeared to be following the trend of other jurisdictions in rendering decisions which essentially delegate to the jury the difficult task of evaluating, without standards, when a particular product design is unreasonably dangerous. Although most reported cases applying Ohio law involved situations where the court had rendered a judgment as a matter of law in favor of the manufacturer on grounds of misuse, non-intended use, or open and obvious danger, the basic rationale of these decisions recognized that the process of evaluating a product design is a jury function. The *Temple* decision, however, has signaled a new direction in Ohio courts.

An early product design case in Ohio which is still recognized is *Gossett v. Chrysler Corp.*<sup>24</sup> Gossett was injured when the hood of the Dodge truck he was driving became disengaged, flew up, and obscured his vision, thereby causing an accident. Gossett contended that the hood latch was negligently designed because the safety latch could be manually held open when the hood was closed, and thereby made inoperable. The jury agreed and awarded damages of \$25,000. On appeal, Chrysler contended that there was insufficient evidence of negligent design of the hood latch to permit submission of the case to the jury. In ultimately agreeing with Chrysler, the court first set forth the rule, which still prevails in Ohio,<sup>25</sup> with respect to a manufacturer's duty concerning product design:

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<sup>23</sup> For example, in a recent Pinto fuel tank trial in California, a jury made an award in excess of \$128 million against Ford Motor Company on behalf of two plaintiffs, of which \$125 million was assessed as punitive damages. The jury apparently not only concluded that the design of the fuel tank was unreasonably dangerous, but that Ford had knowledge of such fact. Obviously, the jurors did not accept the explanation of how Ford balanced the safety and cost factors in designing the location of the fuel tank. *Grimshaw v. Ford Motor Co.*, Nos. 197761, 199397 (Orange Cty. Sup. Ct., Cal., filed Feb. 6, 1978). The trial court has since granted a remittitur of the punitive award to \$3.5 million.

<sup>24</sup> 359 F.2d 84 (6th Cir. 1966).

<sup>25</sup> This standard respecting a manufacturer's design responsibilities as set forth in *Gossett* was cited with favor in *Temple v. Wean United Inc.*, 50 Ohio St. 2d at 326, 364 N.E.2d at 276.

We do not find any cases in Ohio which specifically define the duties of a manufacturer relative to product-design. The general rule may be stated as follows: It is the duty of a manufacturer to use reasonable care under the circumstances to so design its product as to make it not accident or foolproof, but safe for the use for which it is intended. This duty includes a duty to design the product so that it will fairly meet any emergency of use which can reasonably be anticipated. The manufacturer is not an insurer that his product is, from a design viewpoint, incapable of producing injury.<sup>26</sup>

Applying this standard, the court held that Chrysler's hood latch design was not negligent as a matter of law because in order for the safety portion of the hood latch not to attach, it was necessary for someone to hold manually the safety latch and that any such conduct constituted a misuse of the product for which Chrysler, the manufacturer, was not responsible.<sup>27</sup> The court reached this conclusion notwithstanding plaintiff's expert testimony that the "misuse" could have been "reasonably anticipated" by Chrysler and, therefore, the hood latch should have been designed to avoid any such "misuse." In essence, the court held that under Ohio law, a manufacturer has no duty to design against a reasonably foreseeable misuse of his product.<sup>28</sup>

The following year *Shumard v. General Motors Corp.*<sup>29</sup> was decided. In this case, Shumard was killed in an automobile accident while driving a 1962 Corvair which burst into flames upon collision with another vehicle. Shumard's estate filed an action in negligence and strict liability in which it contended that the Corvair was defectively and negligently designed because it burst into flames upon collision. In sustaining General Motors' motion to dismiss for failure to state a claim, the court noted that a manufacturer's duty concerning its product's design was to make the product reasonably fit for its intended use.<sup>30</sup> The court held that a collision

<sup>26</sup> 359 F.2d at 87.

<sup>27</sup> The court stated:

There was no defect in the latch as produced and there was no negligence in its manufacture. It was manufactured strictly in accordance with the design. It functioned perfectly for the purpose for which it was intended. It was only when it was *misused* that it did not function properly.

*Id.* at 88 (emphasis added).

<sup>28</sup> Although the *Gossett* holding may still represent the law of Ohio with respect to the absence of any duty of a manufacturer to design against a reasonably foreseeable misuse of his product, its precedential value has been substantially diminished by *Anton v. Ford Motor Co.*, 400 F. Supp. at 1274, where the court held that a manufacturer had a duty to prevent its product from being unreasonably dangerous *upon collision*—a clearly unintended use or misuse of the product.

<sup>29</sup> 270 F. Supp. 311 (S.D. Ohio 1967).

<sup>30</sup> The court stated that "[d]efendant had a duty to design its 1962 Corvair to be reasonably

is not an "intended use," and that a manufacturer has no duty to design its product to make it safe upon collision.<sup>31</sup>

In a subsequent collision case, *Burkhard v. Short*,<sup>32</sup> the court held in favor of the defendant-manufacturer as a matter of law, but not because the collision was a misuse or an unintended use for which the manufacturer had no design responsibility. Burkhard, a passenger in the front seat of a 1955 Chevrolet, was injured when the automobile was struck by another vehicle, causing her face to strike an unpadded steel dashboard. Burkhard contended that the unpadded steel dashboard was defectively designed because it exposed her to an unreasonable risk of harm upon collision, a risk which was clearly foreseeable by General Motors. The trial court sustained General Motors' motion for summary judgment, which judgment was affirmed on appeal. In reaching its decision, the appellate court first recognized that under some circumstances a manufacturer could be held liable for enhanced injury, under a claim of defective product design in a collision case, even though such design was not the proximate cause of the collision.<sup>33</sup> However, the court then held as a matter of law that because the dangerous aspects of the steel dashboard were obvious to the passenger, and because this dashboard was not unusual or unique when compared with other automobiles, such an open and obvious risk cannot be considered unreasonably dangerous.<sup>34</sup>

In the most recently reported collision-enhanced injury design case

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fit for the purpose for which it was made and without hidden defects which would make the car dangerous to persons using it." *Id.* at 314.

<sup>31</sup> However, the court also held that "[t]he law does not require a manufacturer to make an automobile that will be safe when involved in collisions, and thus the law does not imply that a manufacturer warrants his product to be fit for that purpose." *Id.*

<sup>32</sup> 28 Ohio App. 2d 141, 275 N.E.2d 632 (1971).

<sup>33</sup> "Under some conceivable circumstances, a manufacturer could be held liable for injury suffered by a passenger as a result of defective design, even though the defective design was not the proximate cause of, or related to, the cause of the collision." *Id.* at 148, 275 N.E.2d at 637.

<sup>34</sup> This court holds that a plainly visible, unpadded steel cowl, sometimes known as a dash or dashboard, projecting toward the passenger's seat in a 1965 Chevrolet automobile, which is not shown to be unusual or unique in design as a departure from the design of all other automobile manufacturers or of all other automobiles by the same manufacturer, cannot be considered unreasonably dangerous within the meaning of Section 402(A), Restatement of the Law, Torts, 2d. Under the facts of the case before us, the manufacturer has no duty to the passenger injured by contact with an obviously unpadded cowl which could have been made "safer" by padding and by recessing the same.

*Id.* at 148-49, 275 N.E.2d at 637.

There are authorities from other jurisdictions which have rejected the obvious danger defense in a defective design context. *Collins v. Ridge Tool Co.*, 520 F.2d 591 (7th Cir. 1975), cert. denied, 424 U.S. 949 (1976); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 469, 85 Cal. Rptr. 629, 467 P.2d 229 (1970); See also *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 1115, 348 N.E.2d 571 (1976).

applying Ohio law, *Anton v. Ford Motor Co.*,<sup>35</sup> Anton, a passenger in a Ford Pinto, was injured when the Pinto was struck in the rear by another vehicle, which caused Anton to be thrown out of the Pinto's rear window to the pavement where she sustained burn injuries from the fuel which had escaped from the Pinto's ruptured fuel tank. In her complaint, Anton contended that the Pinto had been defectively designed with respect to its gas tank and/or rear bumper because another design of either of these components would have prevented the rupture of the gas tank. In denying Ford's motion for summary judgment, the court acknowledged that although there were no Ohio Supreme Court decisions on point, the trend of Ohio's products liability cases and the better authority from other jurisdictions was to impose upon the manufacturer the duty "not to design an unreasonably dangerous product."<sup>36</sup> The court also noted that this *included* the duty to use reasonable care in the design of an automobile to avoid subjecting the user to an unreasonable risk of injury in the event of collision.

Applying this standard, and noting that for purposes of the motion the parties stipulated that the plaintiff would introduce at trial some proof that some other design of the gas tank and/or rear bumper would have prevented the rupture of the gas tank, the court concluded that such evidence at trial could raise a jury question whether the vehicle was "unreasonably dangerous in design." In reaching this decision, the court recognized that there were many relevant factors and this determination was essentially a question of fact for the jury to resolve.<sup>37</sup>

*Anton* construed Ohio law with respect to strict liability in product

<sup>35</sup> 400 F. Supp. 1270 (S.D. Ohio 1975).

<sup>36</sup> Considering both the trends in Ohio products liability law, as those are reflected in decisions of the Supreme Court of Ohio, and the substance of the *Evans* and *Larsen* dichotomy, I must conclude that if the Supreme Court of Ohio were to decide the question today, it would follow, substantially, the *Larsen* rule. Properly read, *Larsen* and its second-collision progeny impose upon the automobile manufacturer only the duty not to design an unreasonably dangerous product. In each case, the particular facts concerning the type of vehicle and the type of collision involved must be applied to determine whether a breach of this duty is alleged.

*Id.* at 1281.

<sup>37</sup> The court stated:

But the parties to this action have stipulated for purposes of this motion for summary judgment that plaintiff has proof "that some other design involving the gas tank and/or rear bumper would have prevented rupture of the gas tank of the 1972 Pinto (Dodrill car) as a result of a rearend collision causing an impacting force equivalent to that to which the Dodrill car was subjected. . . ." Proof of such a nature is sufficient to raise a question of fact concerning whether the vehicle in question was unreasonably dangerous in design; factors such as the particular force of impact involved and the customary design techniques utilized by the industry in similar automobile models are relevant to the issue of whether a duty was breached, but are not particularly helpful on a motion for summary judgment.

design in a manner similar to the trend in other jurisdictions, namely, there are many factors which must be considered in determining whether a product is unreasonably dangerous and this task is essentially a jury function. Although no court construing Ohio law had outlined the various factors which must be considered as a result of *Anton* and the other cases, Ohio appeared ready to delegate fully this design assessment function to the jury in the same way as it was occurring in other jurisdictions.

It was in this context of developing case authority that the Ohio Supreme Court rendered its 1977 decision in *Temple v. Wean United, Inc.* It clearly appears from the decision in *Temple* that Ohio has taken a new direction in the handling of product design cases—a new direction which may ultimately remove the “unreasonably dangerous design” inquiry from the judicial process, or at least substantially restrict such inquiry.

In *Temple*, the plaintiff was injured while operating a 75-ton power punch press. Some extrusion material fell off the press and onto the dual operating buttons, causing the press to close down on her arms, crushing her hands and forearms and resulting in the amputation of both arms below the elbow. Among others, Temple sued the manufacturer under theories of negligence, implied warranty, and strict liability. Temple contended that the power press was defectively designed and unreasonably dangerous because the manufacturer failed to provide a fixed barrier guard which would have prevented Temple from inserting her hands and fingers into the danger zone of the press.

Wean United's motion for summary judgment was sustained and affirmed by the appellate court and by the Ohio Supreme Court. In respect to the issue of defective product design, the court observed that although it could find no Ohio case which specifically defined the duties of a manufacturer, the general rule is that the manufacturer has a duty to use “reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended.”<sup>38</sup> The court then stated that it was “aware of the difficulty and open-endedness inherent in passing judgment upon the reasonableness of a manufacturer's conscious design choices.”<sup>39</sup> As a result, the court concluded that it would look to “statutory regulation” for *objective* design standards which could be utilized in evaluating whether the design under consideration was unreasonably dangerous.<sup>40</sup>

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<sup>38</sup> *Temple v. Wean United, Inc.*, 50 Ohio St. 2d at 326, 364 N.E.2d at 276, where the Court quoted with favor the principle from *Gossett v. Chrysler Corp.*, 359 F.2d 84 (6th Cir. 1966).

<sup>39</sup> 50 Ohio St. 2d at 326, 364 N.E.2d at 276.

In *Temple*, the "statutory regulation" was an Ohio Industrial Commission Safety Code and its guidelines with respect to acceptable methods of guarding power presses. These guidelines provided that a two-hand tripping device, the type of guarding device used on Temple's power press, was an acceptable guarding device as was a fixed barrier guard device which Temple contended was the reasonably safe design choice. As a result of this governmentally determined acceptable method of guarding, the court held that the manufacturer was not "negligent" as a matter of law in designing its power press with a two-hand tripping device.

In view of this regulation, which specifies that either a fixed barrier guard or a two-hand tripping device (with which this press was equipped) are acceptable methods of guarding, this court holds that the question of whether or not the manufacturer was negligent in not providing fixed barrier guards should be answered, as a matter of law in the negative.<sup>41</sup>

The Ohio Supreme Court has thus held that where there is a state or federal statute or regulation which recognizes a particular design standard as acceptable, and where the design under consideration satisfies this acceptable design standard, the court will not permit a jury to second-guess the reasonableness of a manufacturer's choice of such governmentally approved design. The court will hold that such product *is not defectively designed as a matter of law*.

Generally, governmentally established or recognized standards are admissible in design cases as relevant evidence on the issue of design reasonableness. However, evidence of compliance with such standard is ordinarily not conclusive on the issue.<sup>42</sup> To the writers' knowledge, *Temple* is the first products liability case in Ohio, and perhaps the nation, which has held that compliance with such standards is conclusive on the issue of product design reasonableness and entitles the manufacturer to judgment as a matter of law.

Given all of the factors which otherwise must be considered and assessed by the judicial system in deciding design appropriateness, judicial deference to a legislative or administrative design standard appears to be a prudent course for Ohio courts to follow. The legislative or administrative hearing process, from which such standards would be set, is more amenable to a full presentation of the necessary evidence on all of the aforementioned factors from which to make a rational evaluation of whether product design

<sup>41</sup> *Id.* at 327, 364 N.E.2d at 277.

<sup>42</sup> See, e.g., *Bruce v. Martin-Marrietta Corp.*, 544 F.2d 442 (10th Cir. 1976). See also R. HURSH AND H. BAILEY, 2 AMERICAN LAW OF PRODUCTS LIABILITY (SECOND) § 9.11 (1974). See also *Statement on Substantive Changes in Tort Law*, Ohio State Bar Association Report 687, 693, appearing in *Ohio Bar*, Vol. 51, No. 23 (June 5, 1978).

is unreasonably dangerous than is a jury trial. The setting for such a hearing process is inherently more dispassionate and objective. Both lay and expert witnesses on all points of view have an opportunity to be heard. The members of the hearing committee, and certainly their staffs, are likely to be technically qualified to hear and assess the evidence presented. All significant competing points of view are more likely represented by the hearing committee members and/or witnesses than in a jury trial. Industry standards, in whole or in part, are often adopted as the national or state "code." Once a design standard is established, it would be uniform throughout the jurisdiction which promulgated it and thus would eliminate conflicting evaluations about the merits of a particular design which inherently result from separate judicial evaluations.

Notwithstanding the holding in *Temple*, there is still a large category of products for which there are no statutory or regulatory design standards. Although it is possible that the Ohio Supreme Court will permit juries to establish subjective design standards in non-regulated areas on a case-by-case basis, there is another possibility as developed in an article by Professor Henderson<sup>43</sup> to which the Ohio Supreme Court referred with favor in its *Temple* decision.<sup>44</sup>

In essence, one of Henderson's concepts is that where there is no governmentally established or recognized acceptable design standard, a manufacturer should not be subject to an "unreasonably dangerous" design inquiry with respect to his design choice. Instead, the scope of the judicial inquiry should be limited to a determination of whether the manufacturer had a duty to warn and/or instruct and, if so, whether the manufacturer properly performed this duty. Such a judicial inquiry would begin with a determination of whether the product design posed a danger to its user in an intended use. If so, it must be determined whether the danger was open and obvious (no duty to warn), or whether the danger was latent or hidden (duty to warn and/or instruct). If the danger was *latent*, the judicial inquiry would then be limited to whether the manufacturer had instructed as to proper use or issued proper warnings concerning such latent dangers. Although these jury questions are in many respects also subjective, they are substantially easier for a jury to handle than the sophisticated balancing of the conflicting factors in an "unreasonably dangerous" design inquiry. This is because each issue must be addressed separately and resolved separately before going forward to consider the next, as opposed to the

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<sup>43</sup> Henderson, *Judicial Review of Manufacturer's Conscious Design Choice: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

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<sup>44</sup> *Temple v. Wean United, Inc.*, 50 Ohio St. 2d at 326, 364 N.E.2d at 276.



"unreasonably dangerous" design inquiry where all of the factors must be considered together and assessed against each other.<sup>45</sup>

In addition, *Temple* could have a further significant impact. There are now many statutes and governmental regulations which provide detailed directions to manufacturers with respect to the warnings and/or directions which must be made a part of products on the market. In this context, if a manufacturer fully complied with these directives, under the rationale of *Temple*, he should not be subjected to strict liability based either upon claims of unreasonably dangerous design or failure to warn or instruct properly.<sup>46</sup>

#### IV. CONCLUSION

*Temple* is a giant step in Ohio toward eliminating the difficulties, as well as the open-ended potential liability of a manufacturer, inherent in the judicial system when attempting to pass judgment upon the reasonableness of a product design choice. The Ohio Supreme Court has now indicated that if there is a way that it can avoid judicially legislating appropriate product design standards, it will do so. Insofar as manufacturers and the paying public are concerned, this should be viewed as a constructive development. *Temple* is a breakthrough in the jungle of confounding legalisms in the increasingly prolific area of product design litigation. It was decided eleven years after *Lonzrick* and is a significant product tort decision of national importance. To what extent it may be adopted in other jurisdictions, or applied in other situations in Ohio, remains to be seen.

<sup>45</sup> Henderson, *supra* note 43, at 1558-62.

<sup>46</sup> In *Temple v. Wean United, Inc.*, 50 Ohio St. 2d at 325, 364 N.E.2d at 275, the Court also recognized that the duty to warn, as part of products law, is based upon traditional negligence concepts. See generally P. HURSH AND H. BAILEY, 2 AMERICAN LAW OF PRODUCTS LIABILITY (SECOND) § 8.21 (1974).