

5-15-2000

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### Recommended Citation

Robert F. Cochran Jr. *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 Pepp. L. Rev. Iss. 4 (2000)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol27/iss4/2>

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# From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?

Robert F. Cochran, Jr.\*

Twenty-five years ago, it looked as if there would be no stop to the expansion of products liability. Imputed knowledge tests imposed on manufacturers liability for harms that they could not have foreseen.<sup>1</sup> Some scholars called for broad enterprise liability that would impose on manufacturers liability for all product-related injury.<sup>2</sup> But, in the early 1980's, courts said "enough." In Professors Henderson and Twerski's metaphor, after seventy years of expanding the products liability frontier, courts halted the wagon trains, and, in many cases, pulled back.<sup>3</sup>

In the last year or so, cigarette litigation has been one of the few areas where there has been signs of expanded products liability.<sup>4</sup> The purpose of this

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\*. Louis D. Brandeis Professor of Law, Pepperdine University; J.D., University of Virginia. I would like to thank Stacey Rock for her research assistance. For further development of some of the themes presented herein, see Robert F. Cochran, Jr., "Good Whiskey," Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury, 45 S.C. L. REV. 269-335 (1994) and Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687-725 (1993).

1. See, e.g., Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (1974) (imputing constructive knowledge upon a sanding machine manufacturer). Imputed knowledge tests were proposed in John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973) and Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1335 (1966).

2. See, e.g., Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976); Frank J. Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 61 (1982) (evaluating conflicting theories of strict products liability); John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS. L.J. 529 (1983) (examining the ambiguities reflected in the Restatement's definition of design defect).

3. See James A. Henderson and Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266 (1991).

4. See, e.g., Warren v. Keane, 196 F.3d 330, 334 (2d. Cir. 1999) (holding a prison liable for inmates' exposure to secondhand smoke); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (medicaid reimbursement); Ramos v. Phillip Morris Cos. Inc., 743 So.2d 24 (Fla. Dist. Ct. App. 1999) (declaring a settlement of a class action brought by thousands of flight attendants, made sick by working on smoky airplanes, for \$349 million to be fair, adequate and reasonable); Broin v. Philip Morris Inc., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (establishing the first trial of a class action

conference is to explore whether there will be doctrinal developments that flow from the tobacco litigation that might affect other products. Will other products follow the tobacco road? Put another way, is the success of the tobacco litigation rooted in characteristics of tobacco, characteristics which other products might share, or is it rooted merely in the deceptive behavior of tobacco officials over a period of time, deceptive behavior which will one day be merely a footnote to product liability history?

My task is to consider the possibilities of alcohol manufacturer liability in light of the tobacco cases. I will first explore the similarities and differences between alcohol and tobacco that might be relevant to the question whether alcohol manufacturers will suffer the same fate as tobacco manufacturers. Then I will consider whether the fact that both of them are what I have called "hedonic products"—products whose primary function is to provide pleasure—might lead to the imposition of stricter liability on them. Finally, I will suggest that what may be emerging is a new strict liability claim for bystanders who are injured by dangerous hedonic products.

## I. SIMILARITIES BETWEEN ALCOHOL AND TOBACCO MANUFACTURER CLAIMS

### A. Hedonic Products

As I mentioned previously, both are hedonic products. Their primary purpose is to provide pleasure. The success of the tobacco cases may indicate that courts are more likely to impose liability on hedonic products than other types of products. Imposing liability discourages the development and sale of products, but courts may be less concerned about this with hedonic products than with products that are more important to human survival and functioning. I will develop this argument

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against tobacco companies as well as the first trial alleging injuries from second hand smoke held for the plaintiffs); Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 468 n.20 (listing the forty states with pending lawsuits when tobacco companies proposed a nearly \$400 billion settlement in 1997); See *Liggett Enters Historic Settlement of Castano, Attorney General Cases*, 22 Mealey's Litigation Reports: Tobacco 3, March 21, 1996 (reporting that Liggett settled the *Castano* case for up to five percent of Liggett's pre-tax income per year for 25 years to be used for smoking cessation programs as well as entered into settlement for Medicaid reimbursement suits with Mississippi, Florida, Massachusetts, West Virginia and Louisiana, agreeing to pay over \$135 million over nine years); Don Holland, *Cigarette Maker Lied, Suit Claims; Philip Morris Sued for Misrepresentations*, L.A. DAILY NEWS, July 19, 1999, at SV1,

Experts say product liability cases, once a hopeless avenue in tobacco litigation, received a boost three years ago when a landmark Minnesota case turned up a treasure trove of documents that showed tobacco industry executives had long been aware of the dangers of cigarettes and the addictive nature of nicotine. . . . Cases that a few years ago might never have been filed are now making their way to court.

in a later section.

### B. Dangerous to Users

Both products are dangerous to users. Studies have indicated that tobacco causes between 300,000 and 360,000 user deaths in the United States per year<sup>5</sup> and that alcohol causes 62,000 user deaths.<sup>6</sup>

### C. Dangerous to Bystanders

Both products are also dangerous to bystanders. Estimates of second-hand tobacco smoke deaths range from 2,490 to 5,160 each year.<sup>7</sup> Approximately 7400 bystanders were killed in alcohol related accidents in 1985.<sup>8</sup>

### D. Social Costs

Both products create high social costs, much of which is borne by taxpayers. Studies have found the social costs of tobacco to range between \$4 billion and \$12 billion,<sup>9</sup> and the social costs of alcohol to range between \$70 billion and \$136

5. See studies cited at Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 271, n.20 (1977). See also Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, H.R. REP., 99th Cong., 99-167, at 4 (1986) (stating that smoking causes the deaths of 350,000 persons per year).

6. One study estimates that alcohol caused 47,748 deaths from disease and 23,190 traffic deaths in 1985, less 1/3 bystander deaths. See Dorothy P. Rice, *et al.*, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985, 118-19 (1990) (this figure includes deaths that the Rice Study lists as "Alcohol-Main Cause", and the deaths that the it attributes to alcohol from "Malignant Neoplasms" and diseases listed as "Other Alcohol-Related Causes").

7. See David E. Ezra, Note, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1065 (1990) citing Eriksen, LeMaistre & Newell, *Health Hazards of Passive Smoking*, 9 ANN. REV. PUB. HEALTH 47, 62 (1988).

8. Cf. RICE, *supra* note 6, at 118 (noting that in 1985 alcohol consumption caused 23,190 traffic deaths) with U.S. DEPT. OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION: DRUNK DRIVING FACTS, (1986), cited in, W. G. Manning, *et al.*, *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 JAMA 1604 (asserting that 7400 of those killed in alcohol related accidents in 1985 had not consumed alcohol).

9. See Garner, *supra* note 5 at 286-90. For additional studies of the costs of cigarettes, see sources cited at Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, n.298 (1998). Two recent studies have argued that tobacco causes external benefits, on the basis that premature deaths due to tobacco leave pension and social security benefits unclaimed. See Manning, *et al.*, *supra* note 8, at 1606 and W. KIP VISCUSI, SMOKING: MAKING THE RISKY DECISION 53 (1992) (The results of the Manning Study also appear in WILLARD G. MANNING, *ETAL.*, THE COSTS OF POOR HEALTH HABITS (1991)). Hanson & Logue provide several challenges to the economic assumptions of the Viscusi and Manning studies. See Hanson &

billion.<sup>10</sup>

### E. Targeted Advertising

The manufacturers of both tobacco and alcohol engage in targeted advertising. One of the major allegations that has been made against the tobacco companies is that they target their advertising towards vulnerable groups, especially children and African-Americans. However, Joe Camel has received far more attention from the anti-tobacco forces than he ever got during the Camel advertising campaigns. For

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Logue, *supra* note 9 at 1232-55. In addition, they make a compelling moral and social argument against the Viscusi and Manning treatment of early death as a social benefit. *See id.* at 1255-60.

[O]pponents of gun control are not heard to tout the enormous financial windfall to society from all the premature deaths caused by handguns. And in no context other than smoking that we can identify do we hear calls for affirmative subsidies to promote the positive externality of premature death.

*Id.* at 1256. As to alcohol, even with the early-death-as-positive-externality assumption, the Manning Study concluded that alcohol created net negative externalities. *See* Manning, *supra* note 8, at 1604-06.

10. A 1992 study sponsored by the National Institute on Drug Abuse and the National Institute on Alcohol Abuse and Alcoholism calculates the economic costs of alcohol abuse to be \$148 billion and an estimated cost of \$166.5 billion in 1995 (due to inflation and population growth). *See* THE LEWIN GROUP, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES (1992), available in <<http://nida.nih.gov/EconomicCosts/Index.html>>. According to this study, the economic burden is carried greatly by those who do not abuse alcohol: governments paid \$57.2 billion (38.6 percent), private insurance covered \$15.1 billion (38.6 percent), victims bore \$9 billion and alcohol abusers themselves, bore \$66.8 billion. *See id.* These costs are absorbed by nonabusers in such ways as government services, crime, insurance, and social welfare. *See id.*

The Rice Study calculates the total cost of alcohol in 1985 as follows (in millions of dollars):

Treatment	\$6,315.00
Support	\$495.00
Morbidity (drinkers' inability to work at peak effectiveness)	\$27,388.00
Mortality	\$23,983.00
Crime Expenditures	\$4,251.00
Motor Vehicle Crashes (legal/court costs, insurance admin., and vehicle damage)	\$2,584.00
Fire Destruction	\$457.00
Social Welfare Administration	\$88.00
Victims of Crime (loss of time)	\$465.00
Incarceration	\$2,701.00
Fetal Alcohol Syndrome	\$1,611.00
<b>Total</b>	<b>\$70,338.00</b>

RICE, *supra* note 6, at 4, 20, 284. Other studies have calculated the social costs to be \$89,526 million in 1980. *See* HARWOOD, *ET AL.*, ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL: 1980 (1984), cited in, RICE, *supra* note 6, at 32. Additionally studies have calculated the same costs to be \$136 billion in 1990. *See* Gibbons, *Alcohol, The Legal Drug* NATIONAL GEOGRAPHIC 2, 6 (Feb. 1992), cited in Joseph Miller, Joseph Millers, Comment, *Seagram v. McGuire. Life Is Not A Booze Commercial*, 17 T. MARSHALL L. REV. 405, 405 (1992).

example, not one of my three children ever paid any attention to Joe Camel. Alcohol ads on the other hand do appear to reach children. When we had a Super Bowl party a month ago, most of the 10 children present paid little attention to the football game; instead, the one thing that would send all of them scurrying to the TV was what I call the "Kermit Budweiser" ads. The loveable little lizards on the Budweiser ads are as popular with children as Ghostbusters, Teenage Mutant Ninja Turtles, Rugrats, or Pokemon ever were.

Of course, like tobacco, there have been alcohol ads aimed at African-Americans as well. But it seems to me that most of the alcohol ads are aimed the vulnerable community that is dear to my heart, the dumpy, white-guy community. Dumpy white-guys and beautiful women consistently appear in alcohol ads and it does not take a marketing expert to recognize that the ads are not aimed at beautiful women.

#### *F. Tobacco, Alcohol, and the Young: A Coming of Age*

A related, but distinct characteristic of both tobacco and alcohol is that both are especially attractive to young people. In part this might be a function of advertising, but I think that their attractiveness is also a result of their being forbidden fruit. For example, in 1990, the state of California established an anti-smoking advertising campaign, but teenage smoking rates have continued to increase.<sup>11</sup> Part of growing up is wanting to be older and when we set age limits on certain activities, we increase their attractiveness. I am not suggesting that there should not be set age limits on smoking and drinking, but we need to recognize doing so may actually enhance their attractiveness.

#### *G. Addiction*

Finally, both tobacco and alcohol are addictive. Advertising causes prospective consumers to start young; addiction causes them to stay long. For both tobacco and alcohol, self-control after long term use is likely to be difficult. Addicts require higher and higher doses to feed their addiction,<sup>12</sup> creating additional consumption and additional risks. Furthermore, it appears that warnings about the addictive nature of these products do little to deter novice consumers. The arguments that Jon Hanson and Kyle Logue have made concerning the addictive quality of cigarettes are true of alcohol as well: the dangerous aspects of a product

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11. See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1329 (1998), citing Andrea Adelson, *Is Anybody Getting the Picture? Despite Ads, Teen-Age Smoking is Unabated*, N.Y. TIMES, July 17, 1997, at D1.

12. See RICE, *supra* note 7, at 2.

are unlikely to deter its use when they are “temporally distant from [its] pleasures.”<sup>13</sup>

Of course, there are significant differences between tobacco and alcohol as well. These differences have been divided into those that make it more likely that liability will be imposed on tobacco manufacturers and those that make it more likely that liability will be imposed on alcohol manufacturers. First, the differences that make tobacco manufacturer liability more likely.

## II. DIFFERENCES THAT MAKE TOBACCO MANUFACTURER LIABILITY MORE LIKELY THAN ALCOHOL MANUFACTURER LIABILITY

### A. Deception

The tobacco companies’ deception in advertising, scientific studies, and congressional testimony is an oft told tale. However, those who think that they will be able to sink the tobacco industry based on its deceptions should note that this deception is not likely to be the basis of product liability claims forever. These claims are based on the past behavior of the tobacco companies. Therefore, they may provide the basis for claims for those who began smoking at the time of the deceptive behavior, but they hold little promise in the long term. At some point, courts and legislatures are likely to stop making tobacco manufacturers pay for the sins of their predecessors.

In contrast, I know of no evidence that there has been deception on the part of alcohol manufacturers at the level of the tobacco manufacturers’ deception.<sup>14</sup> Alcohol manufacturers have acknowledged some of the dangers of their product, though even in their acknowledgments there has at times been some deception. For example, the “know when to say when” campaign of a few years ago acknowledged that there are dangers from excessive alcohol consumption, but the ads also implied that a person will know when he has had too much to drink. Yet, many of us know from experience that is not so.

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13. See Hanson & Logue, *supra* note 11, at 1203-04 and sources cited therein. Hanson and Logue also argue that smokers appear to suffer from the problem of multiple selves, “one who wants clean lungs and long life and another who adores tobacco.” *Id.* at 1205 (quoting Thomas C. Schelling, CHOICE AND CONSEQUENCE 58 (1984)). The authors also note that the behavior of the smoker is inconsistent with the rational actor imagined by most economists. *See id.* at 1208.

14. There have been a few successful failure to warn cases against alcohol manufacturers. *See, e.g.,* Hon v. Stroh Brewery, 835 F.2d 510 (3d Cir. 1987) (discussing the fact that plaintiff suffered from pancreatitis after consuming two or three cans of beer on four or five nights a week); *see also* Brune v. Brown Forman Corp., 758 S.W.2d 827 (Tex. Ct. App. 1988) (discussing the fact that plaintiff’s deceased daughter, a college freshman, consumed straight shots of tequila and died from acute alcohol poisoning).

### *B. Irritation to Bystanders*

Second hand tobacco smoke is not only dangerous to non-smokers, it is irritating. I don't think that this factor is likely to be identified as a part of doctrinal development, but I do think that it adds to the political unpopularity of tobacco. It is likely to influence judges, juries, and legislatures to decide against tobacco manufacturers in resolving tobacco-related issues that they face. Tobacco manufacturers are likely to be unpopular parties. Alcohol creates some irritation to bystanders, but people seem to be more willing to put up with boorish drinkers than they are smelly smokers.

### *C. A Lower Class Drug*

Tobacco manufacturers are also more likely than alcohol manufacturers to be subject to liability because tobacco has become a lower class drug.<sup>15</sup> Those in the policy-making classes are less likely to be smokers than to be drinkers. In fact, some are explicit about their preferences. One leading tobacco litigator said that his group has not considered going after alcohol because, in his words, "We like [it] too much."<sup>16</sup> The influence on decision-makers may be more subtle than it was on this litigator because people grow used to familiar risks, but pay careful attention to risks that seem foreign.

### *D. No Prohibition Experience With Tobacco*

It may also be that our experience with Prohibition may make it more difficult for courts or legislatures to impose liability on alcohol than tobacco manufacturers. They may be quick to say that we tried a ban on alcohol sales and it failed. Of course, there is a big difference between prohibiting sale of a product and requiring it to pay its way; but the association with a failed social experiment may undercut the likelihood of imposing liability on manufacturers of alcohol.

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15. For example, the percentage of those who smoked in 1990 ranged from 31.6% of those who earned less than \$10,000 per year to 19.3% of those who earned over \$50,000. See Jane G. Gravelle, *Burning Issues in the Tobacco Settlement Payments: An Economic Perspective*; see also Symposium: *What Do We Mean by "Taxpayer Relief"?* 51 NAT. TAX J. 437 (September, 1998) (citing Kip W. Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, TAX POLICY AND THE ECONOMY, Vol. 9 (1995)).

16. Bob Van Voris, *Gun Cases Use Tobacco Know-How; New Orleans, Chicago Lead the Charge; Is Alcohol Next?* NAT'L L.J. Dec. 7 1999, at A1.

### E. No Identifiable Culpable Intervening Actor

In alcohol-related accidents in which bystanders are injured courts are likely to place primary responsibility on the drunk driver. There is a tendency on the part of courts to hold that a highly culpable intervening actor cuts off the liability of an earlier actor.<sup>17</sup> In addition, courts generally have not imposed liability on social hosts that serve too much alcohol,<sup>18</sup> although many have imposed liability on dram shops that do so.<sup>19</sup>

In the analogous second-hand smoke cases, it will generally be difficult to identify a culpable intervening actor. It is unlikely that a court would find any culpability in smokers who exposed other people to second hand smoke prior to the recent disclosure of the dangers of second hand tobacco. Even with today's knowledge of those dangers, it would be difficult in most cases to identify a particular smoker who subjected a plaintiff to enough second hand smoke to cause injury.<sup>20</sup>

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17. See, e.g., *Port Auth. v. Arcadian Corp.*, 189 F.3d 305, 318-19 (3d Cir. 1999) (holding that manufacturers of fertilizer products were not liable under negligence and products liability because it was completely unforeseeable that terrorists would use the products to bomb a high rise building with the products); see also *Dawson v. Townsend & Sons, Inc.*, 735 So.2d 1131, 1139-40 (Miss. 1999) (holding that a store owner could not be held liable for not protecting a patron from other patrons when it was not reasonably foreseeable that the patron would be attacked by an individual who was mentally ill); *Suarez v. Sordo*, 43 Conn. App. 756, 769-70 (Conn. App. Ct. 1997) (holding that while it was foreseeable that a crime such as theft might result from an apartment building owner's failure to put locks on the doors, it was not foreseeable that a felon might run through the apartment building, be invited by a tenant to use an unlocked room to hide in and then shoot the police officer who followed him into the building). *But see*, *Green v. Tanyi*, 661 N.Y.S.2d 166, 167 (N.Y. App. Div. 1997) (holding that the throwing of a bottle by an intoxicated patron was not a sufficient intervening factor to negate the liability of the tavern that served the patrons alcohol).

18. See *Sutter v. Hutchings*, 327 S.E.2d 716, 720 (Ga. 1985). See, e.g., *Smith v. Merritt*, 940 S.W.2d 602, 608 (Tex. 1997) (holding that social hosts had no duty to plaintiff to refrain from providing alcohol to the driver and thus were not liable for injuries incurred in a resulting car accident); *Charles v. Seigfried*, 651 N.E.2d 154, 165 (Ill. 1995) (holding that social hosts cannot be held liable under the Dram Shop Act, regardless of whether the alcohol is provided to adults, underage persons or minors); *Kapres v. Heller*, 640 A.2d 888, 891 (Pa. 1994) (holding that a minor cannot be held liable as a social host for providing alcohol to another minor); *Spivey v. Sellers*, 363 S.E.2d 856, 859 (Ga. Ct. App. 1987) (holding that an adult who provides alcohol to a minor may not be held liable for injuries sustained by the minor because, as between the minor and the provider, the minor had the last opportunity to prevent the effects of the alcohol).

19. See, e.g., *Mason v. Lovins*, 180 N.W.2d 73, 81 (Mich. Ct. App. 1970) (holding that the tavern was liable as long as there was no break in the driver's intoxication from the time the tavern sold him the beer to the time of the accident); see also *O'Rourke v. John Day*, 528 P.2d 1030, 1033 (Or. 1974) (holding that plaintiff did not have to prove that the particular liquor served by the defendants was the sole cause of her husband's death); *Overrocker v. Retoff*, 234 N.E.2d 820, 826 (Ill. App. Ct. 1968) (holding that a man injured while breaking up a fight between two intoxicated tavern customers could hold the tavern liable for his injuries).

20. The exception might be one who exposed members of his household to second-hand smoke.

### III. DIFFERENCES THAT MAKE ALCOHOL MANUFACTURER LIABILITY MORE LIKELY THAN TOBACCO MANUFACTURER LIABILITY

Finally, there are at least two differences between alcohol and tobacco that may make alcohol manufacturer liability more likely than tobacco manufacturer liability.

#### *A. Alcohol is Intoxicating*

Alcohol is not only addicting, it is intoxicating. It impairs the ability of consumers to limit consumption in the short term, as well as in the long term. Consumers may initially intend to consume only a few drinks, but after a few drinks they are likely to believe that they can handle a few more, and then a few more. They are subject to diminishing marginal reasoning ability. Alcohol impairs their ability to “know when to say when.” This strikes me as a special danger that might influence courts to impose liability on manufacturers of alcohol.

#### *B. Fewer Causation Problems in Bystander Cases*

One of the problems that plaintiffs have in some second-hand tobacco cases is showing that tobacco smoke caused the loss.<sup>21</sup> Many factors may have caused diseases associated with tobacco smoke. In contrast, bystanders injured in alcohol related automobile accidents are unlikely to have such problems. It is generally clear that without the alcohol, the harm would not have occurred.

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21. See Myron Levin, *Tobacco Firms Win Key Case in Indiana Courts: The Industry Is Found Not Liable in the Death of a Woman Exposed to Secondhand Smoke*, L.A. Times, Mar. 20, 1998, at D3 (asserting that an insufficient connection was found between a hospital nurse with lung cancer and the secondhand smoke she was exposed to in her work, despite the fact that she had never smoked); *No Liability is Found in Secondhand-Smoke Case*, New York Times, June 3, 1999, at A (reporting that an Ellisville, Mississippi jury found the tobacco industry not liable due to lack of causation for the cancer that killed a barber who had never smoked, but was exposed to second-hand smoke.) See also Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435, 450 (1999) (stating that a substantial barrier to success in the second hand smoke suits is that of proving causation); Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 Ohio St. L.J. 405, 428-29 (1991) (suggesting that a popular tactic of the cigarette manufacturer is to provide the jury with so many other potential causes of the plaintiff's injury, the jury “feels compelled” to return the verdict in favor of the defendant); Darren S. Rimer, *Secondhand Smoke Damages: Extending a Cause of Action for Battery Against a Tobacco Manufacturer*, Note and Comment, 24 Sw. U. L. Rev. 1237, 1269 (stating that it is often difficult for plaintiffs to prove that their injuries stem from second hand smoke, given that many products on the market, from cola to peanut butter, contain carcinogens).

### C. Hedonic Product Liability

I believe that one similarity between tobacco and alcohol that may become the basis of courts imposing liability on manufacturers of both is that they are hedonic products—products that primarily provide pleasure. As such, they serve an important function in society, but a function that is not as important as those served by other products. Courts have recognized that we might reasonably impose stricter liability on those products that are not as valuable to society as others.

The New Jersey Supreme Court recognized the lesser value of hedonic products in *O'Brien v. Muskin Corp.*<sup>22</sup>

The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need . . . should be viewed differently from a luxury item.<sup>23</sup>

I acknowledge that most people have expected that this passage from *O'Brien* would remain in the dustbins (the ashtrays?) of history, but the tobacco cases may give it new life.

In addition, there is a widely accepted precedent for varying the strictness of the products liability rule based on the importance of the product to society. Comment k of Section 402A of the Second Restatement of Torts draws a distinction between products that “may be necessary to alleviate pain and suffering or to sustain life” and those that are “used to make work easier or to provide pleasure.”<sup>24</sup> Comment k relieves manufacturers of health and safety products of the risk of strict liability because those products are so important. The California Supreme Court adopted Comment k in the *Brown* case, holding that prescription drugs are not subject to strict products liability. It said:

(T)here is an important distinction between prescription drugs and other products such as construction machinery, a lawnmower, or perfume, the producers of which were held strictly liable. In the latter cases, the product is used to make work easier or to provide pleasure, while in the former it may be necessary to alleviate pain and suffering or to sustain life.<sup>25</sup>

In *Brown*, the Court drew a distinction between products that are used to “alleviate pain and suffering or to sustain life” and those that are used to “make

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22. 94 N.J. 169, 463 A.2d 298 (1983).

23. *Id.* at 177, 463 A.2d at 306. In *O'Brien*, plaintiff was injured when he dove into an above ground swimming pool. The Court suggested that on remand the plaintiff, in an attempt to show that the risks of above-ground swimming pools outweigh their utility, “might seek to establish that pools are marketed primarily for recreational, not therapeutic purposes. . .” *Id.*

24. *Id.*

25. *Brown v. Superior Court*, 751 P.2d 470, 478 (1988) (citations omitted).

work easier or to provide pleasure.” It may be that the courts will draw a further distinction between those that are used “to make work easier” and those that are used “to provide pleasure.” A rule that imposed stricter liability on manufacturers of hedonic product than is imposed on products generally would be the inverse of Comment k. It too, would recognize that some products deserve greater protection than others.

I am not here suggesting that we should outlaw dangerous hedonic products. Dangerous hedonic products play an important role in our society.<sup>26</sup> People enjoy playing football, hunting with guns, and driving pleasure boats. Life would not be very much fun or very interesting if we never did anything that carried with it a risk of death or serious injury. It may be however that in the tobacco cases, courts are beginning to make hedonic products pay their way, no matter how great the products’ entertainment value.<sup>27</sup>

#### IV. AN EMERGING INJURED BYSTANDER/DANGEROUS HEDONIC PRODUCT LIABILITY THEORY?

The category of cases that may yield a new theory of law is the bystander cases. The California Supreme Court long ago recognized that bystanders might be entitled to greater protection in tort law than consumers.

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.<sup>28</sup>

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26. As one court said, “Sports are absolutely essential to the public welfare.” N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 600 (1971), *quoted in* O'Brien, 463 A.2d at 314 n.4 (Schreiber, J., dissenting).

27. The Third Restatement of Torts/Products Liability recognizes that there could be some products that are of such little value relative to their risks that they would be subject to strict liability without the plaintiff showing an alternate design. The Restatement gives the example of an exploding cigar. It might be that some day, the question whether the benefits of non-exploding cigars (and cigarettes) outweigh their risks will go to the jury.

28. *Elmore v. American Motors Corp.*, 451 P.2d 84, 89 (1969) (holding bystander injured in automobile accident entitled to bring products liability claim).

The two types of tobacco cases that have demonstrated the most promise can be characterized as bystander cases: suits brought by victims of second-hand tobacco smoke and those brought on behalf of taxpayers who have paid the bills for the medical care of tobacco-related illnesses.<sup>29</sup> The greater viability of these bystander cases is illustrated by the fact that tobacco companies have been willing to settle both the second-hand smoke and the taxpayer cases for substantial amounts of money.<sup>30</sup>

It may be that what is emerging is a right in bystanders to recover when injured by a dangerous hedonic product. Under such a rule, plaintiffs would not have to prove that the product is defective, but would have to meet three requirements that courts have not generally imposed in strict products liability cases. They would have to show:

- 1) that the product is dangerous;
- 2) that the product is a hedonic product, i.e., its primary purpose is to provide pleasure; and
- 3) that the plaintiff was a bystander, i.e., one who was not benefitting from the product.<sup>31</sup>

Each of these factors, by itself, presents some justification for imposing strict liability. However, when all of these factors are present, the justification for manufacturer liability is very strong. Such a rule could be the basis for claims, not

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29. It may seem odd that I classify the taxpayer cases as bystander cases, but taxpayers have the important characteristics of bystanders. Taxpayers are hit with costs arising from a product that they did not use. Of course they are hit with this liability because they (through their elected representatives) chose to reimburse smokers for their losses, but society seems to have accepted such medical care reimbursement as a given in the welfare state. In both the second-hand tobacco cases and the taxpayer cases, the parties incurring the loss did not benefit from the product. If liability is not imposed these losses are externalities.

30. See, e.g., *Ramos v. Phillip Morris Cos.*, 743 So.2d 24 (Fla. Dist. Ct. App. 1999) (holding a settlement of a class action brought by thousands of flight attendants, made sick by working on smoky airplanes, for \$349 million to be fair, adequate and reasonable). Tobacco companies have spent \$206 billion in settlement with forty states. See Sandra Torry, *The Washington Post*, *Big Tobacco Loses Huge Suit: Florida Jury Firms Defrauded Smokers in First Class-Action; To Weigh Damages*, *Pittsburgh Post-Gazette*, July 8, 1999, at A1.

31. In addition to showing that the manufacturer should be subject to liability, plaintiff will of course have to show that the manufacturer's production of alcohol was a cause-in-fact of damages. Cause-in-fact may be a problem in many cases. Traditionally, plaintiffs had to show that without the manufacturer's production of the product, they would not have suffered the loss. In some alcohol cases the drinker may die in the automobile collision. It may be difficult to show the brand of alcohol that the drinker consumed. In such cases, it would be appropriate to apply a market share rule, under which manufacturers of alcohol that could have caused the loss bear responsibility for the injury based on their market share of alcohol in the region in which the drinker consumed the alcohol. See *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980), *cert. denied*, 449 U.S. 912 (1980).

only by taxpayers and victims of second-hand smoke, but by bystanders injured in alcohol-related accidents. I will now consider the justifications for allowing bystanders to recover against manufacturers of dangerous hedonic products, with particular attention to the strengths of the arguments in alcohol cases.

### A. *Spread the Risk*

The first argument is that we should spread the risk of bystander injury among the consumers of a product. The spread-the-risk argument is basically that we should use the products liability system to create an insurance system. As to consumer injuries, this would be analogous to a first party insurance system. When we purchase products, each of us would pay a bit more for the products (those are our premiums), and if one of us is injured, she is entitled to be reimbursed for what may be a tremendous loss. Judge Traynor presented the classic justification for spreading the risk in *Escola*: "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 injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>32</sup>

The best argument against spreading the risk through the products liability system in consumer injury cases is that to do so would be paternalistic: Courts should not require people to pay more for their products so that they can recover if they are injured. If they want insurance, they can buy their own. In the case of consumer injury from tobacco or alcohol there is a fairly strong argument for paternalism. Much of the marketing of tobacco and alcohol is directed at the young, who may need a little paternalism, and both products are addictive.<sup>33</sup> The anti-paternalism argument is based on the assumption of an autonomous consumer, which may not apply in the tobacco and alcohol cases.

The argument for spreading the risk is even stronger in bystander cases. When courts impose liability on manufacturers for *consumer* injury, they impose on consumers a first party insurance system, consumers pay more for their products and are compensated for their injuries. When courts impose liability on manufacturers for *bystander* injury, they impose on consumers a third party insurance system, a system that provides compensation to other parties that consumers may injure. It may not be the business of the state to protect people from themselves, but it is the business of the state to protect people from each other. The state might legitimately adopt a tort rule that requires consumers to pay for the injuries that

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32. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (1941) (Traynor, J., concurring).

33. For a thoughtful discussion of the addictive nature of cigarettes, see Hanson & Logue, *supra* note 11, at 1193-1221.

their products create to others.

### B. Internalize the Cost

A second justification for imposing liability on manufacturers of dangerous hedonic products for injuries to bystanders, is that manufacturers will internalize the cost of bystander injury. They will choose a combination of safety steps and price increases in order to cover bystander loss.<sup>34</sup> If the market is to work efficiently, the costs of the product should reflect the risks to bystanders, as well as the other costs of the product. When manufacturers pass these costs to consumers, the price of products will more nearly reflect the costs that the products create to society, and consumers will be forced, through the higher prices, to take into consideration the losses that those products cause.<sup>35</sup>

Hanson and Logue have made the argument for internalizing the costs of second-hand smoke in the price of cigarettes.<sup>36</sup> Those injured from second-hand smoke should be entitled to recover from tobacco companies and the price of cigarettes will include the costs to second-hand smokers.

Currently, tort law internalizes the risk of some bystander injuries in alcohol cases by imposing liability on the negligent drinker for injuries to bystanders. To the extent that drinkers think about the danger that they will injure someone else and be subject to liability, they are likely to be deterred from drinking before driving. Unfortunately, not all drinkers are the rational, profit-maximizing actors that economic theory posits. The ability of drinkers to do a cost/benefit analysis is likely to be diminished by the product. As drinkers drink, their ability to evaluate their driving ability diminishes. They become increasingly less likely to "know when to say when." Some drinkers are alcoholics and place a value on over-consumption that a reasonable person would consider to be "excessive." Imposing liability on the drinker alone will not yield reasonable levels of safety and efficiency. Courts should keep any pressure that the risk of liability might impose on drinkers by continuing to allow injured bystanders to recover from intoxicated drivers and by giving any manufacturers held liable to bystanders an indemnity cause of action against drinkers, but courts cannot expect drinker liability alone to

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34. As Judge Adams of the Third Circuit Court of Appeals said in a case extending strict liability for defective products to manufacturers for bystander injury:

Inasmuch as the defective product may well injure persons who have not purchased the product or in any way dealt with the manufacturer, there is no price mechanism by which to insure such persons against the risk of loss. The imposition on manufacturers of strict liability for defective products accomplishes the cost internalization that the price mechanism cannot achieve by placing the complete cost of the injuries on the manufacturer.

Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288 (3d Cir. 1980). His argument applies to bystander injuries from non-defective products, just as it does to those from defective products.

35. See Klemme, *supra* note 2, at 158-61.

36. See Hanson & Logue, *supra* note 11, at 1193.

yield reasonable levels of safety.

Even if drinkers were able to consider the risks of their potential liability to injured bystanders, in many cases, they will not have to bear the full cost of bystander injury. Drinkers are not as likely as manufacturers to be able to pay the damages of a seriously injured victim.<sup>37</sup> In some cases, damages will be greater than the insurance limits plus the assets of the drinker. The risk that the drinker will be judgment-proof may be especially great in the case of alcoholics.

Imposing liability on manufacturers for bystander injury in alcohol cases is likely to result in an increase in price, a reduction in consumption, and an increase in safety. I have previously estimated that manufacturer liability for bystander injury would give rise to alcohol price increases of approximately 4.5 percent and a reduction in consumption of 2.25 percent.<sup>38</sup> It may be that price increases would not have a significant impact on alcoholics. Price increases, however, would be likely to have the greatest influence on younger drinkers, who are less likely to be addicted, have less disposable income, and, therefore, have a more elastic demand for alcohol.<sup>39</sup> Reduction in consumption by younger drinkers might have a significant effect on safety, because younger drinkers are much more likely than older drinkers to be involved in alcohol-related accidents.<sup>40</sup>

### C. Corrective Justice

Finally, I believe that when the drinker is unable to pay, manufacturers should pay for bystander injury as a matter of fairness. As between the manufacturer who gains by the sale of the alcohol and the bystander, the manufacturer should pay. As Heidt has argued in a different context, "To the extent that the actual wrongdoer cannot compensate the victims, corrective justice requires that the innocent gainers be made to give up their gains to compensate the victims."<sup>41</sup>

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37. See Peter M. Kincaid, Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1137 (1983).

38. See Robert F. Cochran, Jr., "Good Whiskey," *Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Hedonic Products for Bystander Injury*, 45 SOUTH CAROLINA L. REV. 269, n.101 (1994).

39. See Coate & Grossman, *Change in Alcoholic Beverage Prices and Legal Drinking Ages: Effects on Youth Alcohol Use and Motor Vehicle Mortality*, ALCOHOL, HEALTH, & RESEARCH WORLD 22, 23 (Fall, 1987).

40. In 1984, 35 percent of the drivers involved in fatal accidents were under the age of 25, but only 20% of the licensed drivers were under 25. See *id.* at 22 (citing NATIONAL HWY. TRAFFIC SAFETY ADMIN. (1986)). One study of the effect of alcohol price increases on driving safety found that, "deaths from motor vehicle accidents appear to decline at a statistically significant rate among all young people when the price of beer increases. . ." *Id.* at 25.

41. Heidt, *Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 360 (1990).

This is especially true as to the profits that alcohol manufacturers gain from the over-consumption of alcohol. The profit that manufacturers receive from the moderate consumption of alcohol might reasonably be characterized as legitimate gain; but the profit that they receive from over-consumption of alcohol might reasonably be considered wrongful gain. Of course, it would be impossible to stop the wrongful gain without also stopping the legitimate gain. Nevertheless, when those who over-consume alcohol cannot compensate bystanders, manufacturers who benefit from the over-consumption should pay for the losses. Drinkers' over-consumption of alcohol causes both losses to injured bystanders and profit to alcohol manufacturers. When drinkers cannot compensate bystanders, the manufacturers gains have been at bystanders' expense.<sup>42</sup>

Under corrective justice, the goal is to restore the status quo, to return the parties to the position that they were in before the wrongful loss and the wrongful gain. Bystanders should be returned to the position that they were in prior to the injury and manufacturers should pay for those losses that the drinker is unable to pay, at least so long as that payment will not exceed manufacturers' gain from the over-consumption of alcohol. In the case of alcohol-related accidents, it is fairly clear that the losses of bystanders are substantially less than the gain of manufacturers from over-consumption.<sup>43</sup>

Of course, if courts impose liability on manufacturers, manufacturers will pass some of these costs to consumers in higher prices. Some might argue that it is unfair to impose on responsible drinkers the costs created by irresponsible drinkers. However, it is appropriate that responsible consumers share some of the cost of the bystander's injury. Even responsible drinkers help to create the danger. The damage that results from a product is caused, by its demand as well as its supply. Responsible, as well as irresponsible, consumers should not benefit from products at the expense of injured bystanders.

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42. Cf. Heidt's argument concerning the creditors of toxic waste dumpers: "The dumper's wrongful activity resulted in both the losses to the victims and the gains to the creditors. If the actual wrongdoer, the dumper, cannot compensate the victims, the creditors' gains have, in effect, been at the victims' expense."

*Id.* at 361.

43. In 1985 bystander liability would have resulted in manufacturer payment of approximately \$2.5 billion in damages. See Cochran, *supra* note 38, at 269. Half of the manufacturers' gain comes from the over-consumption of alcohol (10% of drinkers consume 50% of the alcohol). See NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, REPORT ON ALCOHOLISM AND HEALTH (1987), cited in LABEL, JOHN BARLEYCORN MUST PAY 221 (1992). The total sales of alcohol in the United States in 1985 were \$56 billion. See U.S. INDUSTRIAL OUTLOOK, U.S. DEPARTMENT OF COMMERCE 42-29 (January, 1988). Manufacturers' net profits from over-consumption clearly are much greater than bystander losses from over-consumption, and, therefore, it appears that under corrective justice, manufacturers of alcohol should pay for bystander injury.

*D. Conclusion*

In my view, there are several similarities between tobacco and alcohol that suggest that manufacturers of alcohol may be the next to be subject to hedonic product liability. Both products are addictive and cause substantial harm to consumers, bystanders, and society as a whole. Currently, many of the costs that are created by these products to bystanders and society as a whole are external costs, and it may be that courts should internalize these costs by imposing liability on manufacturers. Imposing liability would cause the price of these products to more clearly reflect the costs that they create. An increase in prices would discourage use and increase safety. These are hedonic products—products whose primary purpose is to provide pleasure—and it would not be a great loss if their use is diminished. Both products are especially dangerous when consumed by young people and an increase in costs will help to discourage their use among the young who generally have limited disposable income. As to victims of second-hand smoke and bystanders injured in alcohol-related accidents, it seems to me that the case for liability is especially strong. Manufacturers and consumers of these products should not benefit from the products at the expense of injured bystanders. Imposing liability would spread the risk of bystander injury to all users of the products.

